Monograph #8

HUMAN RIGHTS:

IMPROVING U.N. MECHANISMS FOR COMPLIANCE

by Joseph Preston Baratta

Published by

The Center for UN Reform Education

418 Seventh Street, S.E.
Washington, D.C. 20003
202-546-3956

U. N. REFORM MONOGRAPH No. 8

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CENTER FOR U. N. REFORM EDUCATION (CURE)

MAY 1990

ABOUT THE CENTER FOR U.N. REFORM EDUCATION

In the late 1970s a growing concern developed regarding the inability of the United Nations system to settle regional conflicts, many of which threatened to escalate into nuclear war. As a result, Congress in 1978 directed President Carter to prepare a report on his recommendations for the reform and restructuring of the U.N. system.

The report was sent to Congress and hearings were held. Some of the President's proposals were then submitted to a special committee at the United Nations to consider and formulate recommendations for improving the U.N. system. Unfortunately, these developments were ignored by the mass media.

In view of this news blackout, thirty-nine organizations decided in 1978 to stimulate public discussion by holding a conference at Villanova University on the President's report and on varying reactions to it in order to inform civic, religious, and educational leaders in the world community. Representatives of over seventy organizations attended the three day conference, which they greeted with enthusiasm. At its close, participants called for the creation of an organization that would continue to sponsor conferences focused on proposals for increasing the effectiveness of the United Nations, promote an exchange of ideas on U.N. reform, and publish research on ways to improve the U.N. system.

The Center for U.N. Reform Education, a non-profit educational organization, was formed as a result. Twenty-one national organizations now cooperate with the Center to help it carry out the purposes for which it was formed.

The Center for U.N. Reform Education does not take positions in regard to any particular U.N. reform proposal. This monograph is being published by the Center as part of its on-going educational program to encourage discussion on whether the U.N. system needs to be improved, and, if so, how. This monograph on international human rights is the eighth in a series that the Center will be publishing on issues of strengthening the United Nations.

Contributions to the Center for U.N. Reform Education are tax-deductible and will help the Center to continue and expand its educational work. For more information on the Center, or on other publications, video tapes, and monographs available from the Center, please write to:

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Preface

The Center for U.N. Reform Education wishes to thank the U.S. Institute of Peace for a special grant which enabled it to commission Dr. Joseph Preston Baratta to research and write this important monograph on *Human Rights*. Additional support is ackowledged from the Ploughshares Fund. The Center also wishes to thank Professor Frederic Kirgis, Jr., of Washington and Lee University who reviewed and critiqued this monograph before printing.

Dr. Baratta is an able scholar and historian of the world federalist movement and of efforts to strengthen the United Nations. His published works include a 350 page bibliography on *Strengthening the United Nations* (Westport, CT: Greenwood Press, 1987). He prepared three previous monographs in this CURE series: *Verification and Disarmament*, *International Peacekeeping*, and *International Arbitration*.

Between 1985 and 1988, Dr. Baratta was the official U.N. Representative of the World Association for World Federation at the United Nations. He is currently working on a critical, political history of the world federalist movement and of internationalism generally, tentatively entitled, *What Happened to One World?*

The author holds a B.A. from St. John's College and a M.A. and Ph.D. in American Diplomatic History from Boston University. His doctoral dissertation was on the origins of the movement for world government, 1937-1947. A former Assistant Professor of History at Boston University, he is a member of numerous professional organizations, including the American Historical Association, the Society of Historians of American Foreign Relations, the International Studies Association, the Council on Peace Research in History, and the Society for the Study of Internationalism, of which he is executive secretary.

Recently published CURE monographs include: *Proposals for a More Dependable U.N. Revenue*, *Verification and Disarmament*, *Proposals for a More Equitable General Assembly Voting Structure*, *International Peacekeeping*, and *International Arbitration*.

The Center is an umbrella organization affiliated with twenty-one diverse organizations. Its purpose in publishing this monograph is to generate discussion on how to improve international compliance with U.N. human rights treaties. The views expressed are those of the author and do not necessarily reflect the policies or ideas of the Center or of its affiliated organizations.

Comments on this monograph and requests for additional material will be most welcome.

Walter Hoffmann
Administrative Director
Center for U.N. Reform Education

Abstract

Joseph Preston Baratta, *Human Rights: Improving U.N. Mechanisms for Compliance* (Washington, DC: Center for U.N. Reform Education, U.N. Reform Monograph No. 8, May 1990), 109 pp.

Rights are individual liberties or claims for protection from, or for assistance of, governments, enforceable by law. Human rights are rooted in Biblical law, natural law, positive law, and international law. Since the founding of the United Nations (1945) and the promulgation of the Universal Declaration of Human Rights (1948), the individual increasingly has been recognized as a "subject" of international law, entitled to its protection.

The International Bill of Human Rights and over 68 international human rights instruments are briefly described. The United States led in creating the new human rights "order," and American domestic practice is a model to the world, but since the Bricker amendment controversy in the Fifties the U.S. has hesitated to ratify many of the instruments. The human rights set out are quite visionary. The main problem is implementation.

The reporting system under the International Covenant on Civil and Political Rights (originally proposed by the U.S.) is contrasted with a range of mechanisms, including the effective ILO and European Convention models. Obstacles include the "antinomy" between Realpolitik and human rights -- the lesson of Munich vs. the doctrine that peace is directly linked to respect for human rights. U.S. *interests* in compliance are basically that the new international standards confirm and extend American values to others, help to establish justice as the fundamental condition for world peace, and further the objective of the impartial rule of law.

The history of U.S. human rights policy is briefly recounted. The Senate debates over the four treaties submitted by President Carter in 1978 are rehearsed closely in order to understand arguments pro and con for future debates. The Genocide Convention ratified in 1986 followed the pattern. A "non-self-executing" reservation is accepted as "political."

Both U.N. "bias" and U.S. "selectivity" must be reduced in order to strengthen the protection and promotion of political and economic rights throughout the world. One U.S. option is to abandon human rights as a criterion for aid, leaving the field to the present U.N. The alternative, here recommended, is to return to world leadership in reforming U.N. implementation. Nine general proposals for improving U.N. compliance mechanisms are presented: integrating the international law of human rights, improving coordination, exposing bias, increasing use of individual experts, granting the right of individual petition, increasing NGO access, creating a High Commissioner for Human Rights, upgrading the Commission on Human Rights to a Council, and establishing a World Court of Human Rights.

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"Reforming the United Nations so that it can advance the cause of human rights with true impartiality as in the fine conception of the Charter is, we think, the proper human rights policy objective of the American people and their government."

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HUMAN RIGHTS:

IMPROVING U.N. MECHANISMS FOR COMPLIANCE

I. The Idea of Human Rights

"Those who have power call their wishes justice.
Those who have not power call their wishes rights."

-- Roger N. Baldwin, 1953

Background. The idea of human rights is a twentieth century revival of the older idea of natural rights. Natural rights, as set out in the English, American, and French constitutions, are individual liberties or claims for protection by law against government. Historically, the idea of right or freedom can be traced to Biblical law, natural law, positive law, and, most recently, international law. As Kant and other social contract philosophers argued, human freedom is really only enjoyable under the rule of law.

After World War II, the terrible abuses of human life and liberty by the Nazis -- particularly their systematic murder of six million Jews in the Holocaust -- led to a new international commitment to protect human rights. The original instrument of the new commitment was the Universal Declaration of Human Rights, approved by the United Nations in 1948. The current flowering of human rights instruments is rooted in this document.

Human rights, unlike traditional, contractual, or legal rights, are said to be innate and universal. They are not granted by any higher power, as if they were privileges, but inhere in each human being's very nature or "inherent dignity." In the words of the Universal Declaration: "All human beings are born free and equal in dignity and rights" (Art. 1).

The rights included consist of fundamental civil and political rights and freedoms familiar to liberal democracies, plus the new economic, social, and cultural rights developed by the socialist critique of capitalism. Typical of civil rights are the rights to life, liberty, and security of person; prohibitions against slavery and torture; rights to recognition as a person before the law, to equality before the law, and to non-discrimination; the entitlement to a fair and public trial; the presumption of innocence until proven guilty; rights to privacy, freedom of movement, emigration and return to one's country, asylum, and nationality; the right to marry and found a family; and the right to own property (Arts. 1-17).

Political rights include the freedoms of speech, information, and peaceful assembly; and the rights to vote and participate in a government based on the will of the people (Arts. 18-21).

Economic rights include the rights to work, to equal pay, to just and favorable remuneration, and to join trade unions; the right to social security; the right to rest and leisure; the right to an adequate standard of living and, in the case of mothers and children, to special care and assistance (Arts. 22-25).

Social rights include the right to education, which shall be free and

compulsory at the primary level (this is the only right that is a compulsion), and the right to an international order in which human rights can be fully realized (Arts. 26 and 28).

Cultural rights include the rights to participate in the cultural life of the community, to share in scientific advancement and its benefits, and to have one's interests in authorship or creation of a work of art protected (Art. 27).

Lastly, all persons are said to have reciprocal duties to the community, and to be subject to only such limitations of their rights and freedoms as are determined by law for the protection of the rights of others and for preserving morality, public order, and the general welfare in a democratic society (Arts. 29-30).

Revolution in International Law. International lawyers and national delegates in U.N. fora have been the leaders of the human rights movement in the last forty years. The public has yet to fully appreciate the scope of what the lawyers call a "revolution" in international law. For the first time, the individual is recognized as a subject of international law and is entitled to its protection. The standards on the whole are visionary, as befits the great need in the late twentieth century for vision. The main problem now is implementation.

The problem is that, under human rights treaties, individuals are the main beneficiaries, while states get little in return from the international agreements -- have little *interest* in them -- compared, say, to lucrative arms sales or prestigious diplomatic contacts. Moreover, states

are usually the main offenders in human rights cases, so implementation is often a cause of acute embarrassment to the state, if not of retaliation on the hapless victim. In our view, observance of human rights is always in the state's interest, and its prestige is enhanced by public cooperation with international supervisory bodies.

U.S. Leadership. The United States exercised vital world leadership in the establishment of the United Nations, the drafting of the Universal Declaration of Human Rights, and the early work of the U.N. Commission on Human Rights. The Bricker amendment controversy (1951-57), however, set back U.S. leadership. In 1986, during the Reagan administration, the Senate finally ratified the Convention on the Prevention and Punishment of the Crime of Genocide, after a delay of thirty-seven years. The U.S. has not yet ratified such major human rights treaties as the International Covenant on Civil and Political Rights, the Covenant on Economic, Social, and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the American Convention on Human Rights, all of which were sent to the Senate by President Carter in 1978.

II. International Human Rights Instruments

> "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. . . ."
>
> -- International Covenant on Civil and Political Rights, Preamble, 1966

U.N. Charter. The United Nations Charter was the original source of authority for the Universal Declaration of Human Rights, which in turn was the main source of inspiration for subsequent international legal instruments to protect and promote human rights. The Charter reaffirmed "faith in fundamental human rights" (Preamble), and declared that to develop "respect for equal rights and self-determination of peoples" was one of its major purposes (Art. 1(2)).

Both the General Assembly and the Economic and Social Council (Ecosoc) were given competence in the field (Arts. 13(1), 62(2)). Ecosoc was expressly granted the power to establish a commission on human rights (Art. 68), which was done in 1946. Two articles of great importance for human rights are Arts. 55 and 56. Art. 55 committed the entire organization, for the purpose of building "peaceful and friendly relations among nations," to promote "universal respect for, and observance of, human rights and fundamental freedoms." Art. 56 pledged member states to cooperate for the achievement of the goals set out in Art. 55. These seven clauses in the Charter were the legal roots of the Universal Declaration.

International Bill of Human Rights. When the San Francisco conference adjourned in 1945, one of the major items of unfinished business was the formulation of an international bill of rights. President Harry S. Truman expressed the hopes of delegates and of humanity when he said in his closing address:

> [Under the Charter] we have good reason to expect the framing of an international bill of rights, acceptable to all the nations involved. That bill of rights will be as much a part of international life as our own Bill of Rights is a part of our Constitution. The Charter is dedicated to the achievement and observation of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language, or religion -- we cannot have permanent peace and security.[1]

The Commission on Human Rights was established in accordance with Art. 68 early next year. Its chairman was Eleanor Roosevelt, whose warmth and political judgment made her the perfect choice to continue U.S. leadership in the field of human rights. Another prominent member was France's René Cassin, a far-seeing international lawyer and publicist.

The Commission quickly decided that the international bill would have to be promulgated in two stages: first, a nonbinding declaration or manifesto, which would have "moral weight" only; then, a binding convention or treaty, which would carry obligations under international law.

Two Views of Domestic Jurisdiction. Cassin made the most revolutionary interpretation of the Commission's task. He argued that after the

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[1] Quoted in Louis B. Sohn, "A Short History of United Nations Documents on Human Rights," in Commission to Study the Organization of the Peace, *The United Nations and Human Rights: Eighteenth Report* (Dobbs Ferry, NY: Oceana, 1968), 55.

world's experience with Nazi Germany, the rights of individuals and peoples could only be safely guaranteed by a higher international authority than that of any national state. Cassin's crucial point was that human rights, even as listed in the forthcoming U.N. Declaration, could not fall under the Charter's domestic jurisdiction clause (Art. 2(7)), which provides that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . ." Human rights, he maintained, had been raised by the states members themselves, especially in Art. 56, to the level of international obligation. "The individual," he concluded, "becomes a subject of international law in respect of his life and liberty."[2]

Mrs. Roosevelt did not agree. The Declaration would only serve as a "guide and inspiration," while elevation of human rights from domestic jurisdiction to international law "should be limited to States parties to the [binding] Convention."[3]

Universal Declaration of Human Rights. The upshot was that the Commission produced the Universal Declaration of Human Rights as a "common standard of achievement." Largely because of so modest a claim, the Declaration was approved unanimously by the General Assembly in 1948.[4] The bind-

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[2] Ibid., 60-61.

[3] Ibid.

[4] The vote was 48-0-8 (10 December 1948). The Soviet Union, Byelorussia, Ukraine, Poland, Czechoslovakia, Yugoslavia, Saudi Arabia, and the Union of South Africa abstained.

ing Convention, renamed a Covenant and then split into two Covenants -- the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights -- was delayed for almost twenty years (1966). The main causes for delay were differences, exacerbated by the Cold War, about the nature of economic rights compared to political rights and about the acceptable means of international implementation. (Henceforth in this paper, we will abreviate "civil and political" with "political," and "economic, social, and cultural" with "economic.")

The dispute over economic and political rights was long and bitter. The United States and the Soviet Union were at the extremes of this dispute, but there was a large middle ground, occupied by the Western social democracies of Europe, the communist "people's republics," and the newly independent countries of Africa and Asia, many of them nonaligned. The view of the communist and developing countries was that traditional liberal rights like freedom of speech meant little to peoples ground down by poverty, hunger, and disease. "Human rights begin at the breakfast table," summarized their position.

The West, on the other hand, regarded economic rights, like the right to work, as unenforceable by law and hence not rights at all, since they depended on the state of the economy in a country. Political rights and freedoms were the absolute minimal rights and indeed the condition for economic growth, as the historical development of the West showed. In other words, "Human rights begin at the police station."

Gradually an understanding was reached that civil and political rights

were claims that were immediately enforceable against government; while economic, social, and cultural rights were needs or goals that required positive programs of government.[5]

Two Covenants. This distinction is reflected in the two Covenants, not in the concept of "rights," which are held to belong alike to all human beings, but in the different state obligations accepted in either Covenant. In the Political Covenant, states undertake "to respect and to ensure to all individuals" the rights therein defined. In the Economic Covenant, they undertake "to take steps . . . to achieving progressively" the listed rights (Art. 2(1) in both Covenants). In the first, the language is: "Everyone has the right . . ." or "No one shall be deprived . . . ," emphasizing the legal protection of the individual. In the second, "The States Parties recognize the right . . ." or "undertake to ensure . . . ," emphasizing the development programs necessary to meet human needs. States "protect" political rights and "promote" economic ones.[6]

Since in recent practice most states accept both limitations on their power over individual citizens and obligations to intervene in the economy on their behalf, the distinction has become less heated. In 1977, the General Assembly declared that all human rights were "indivisible and interdependent."[7] The issue remaining for any state in adhering to international

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[5] Louis Henkin, *The Rights of Man Today* (Boulder, CO: Westview, 1978), 18-30.

[6] Robertson, *Human Rights in the World,* 180, 196.

[7] Ibid., 70. A/32/Res/130 (16 December 1977).

human rights instruments is whether the freedoms or needs of their citizens are acceptable as a matter of *universal right*.

Customary (Binding) International Law. The Universal Declaration over the years has shed its status as a mere standard for achievement and has acquired a binding character of its own in international law. The Declaration has been incorporated into so many new national constitutions and has been cited in so many U.N. documents, including virtually all the human rights instruments, that since 1976 leading legal scholars like Prof. John P. Humphrey, Egon Schwelb, and Sir Humphrey Waldock have said that the Universal Declaration of Human Rights is part of "customary international law."[8] Louis B. Sohn described it in 1968 as an "authoritative interpretation of the Charter."[9]

The U.N. Conference on Human Rights, meeting in Teheran in 1968 shortly after the two Covenants were finally adopted, declared that the Universal Declaration "constitutes an obligation for the members of the international community." The new status has even been recognized in U.S. courts. In the important case of *Filartiga v. Peña-Irala* (1980), a U.S. Federal Court of Appeals recognized the Declaration as customary international law when it found a Paraguayan inspector general of police (arrested

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[8] Richard B. Lillich, "Civil Rights," in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues* (Oxford: Oxford University Press, 1986), 116; Jack Greenberg, "Race, Sex, and Religious Discrimination," in Meron, pp. 314-15; Vernon Van Dyke, *Human Rights, the United States, and World Community* (New York: Oxford University Press, 1970), 124. By 1968, Secretary General U Thant found that 43 national constitutions had incorporated references to the Universal Declaration.

[9] Sohn, "Short History," 69.

in the U.S.) guilty of violating the prohibition against torture (Art. 5).[10]

Thus, even without universal adherence to all the human rights instruments, the standards of the Universal Declaration have over time earned universal assent. They cannot be violated openly on the plea that human rights are a matter solely of domestic jurisdiction. René Cassin would be proud.

International Human Rights Instruments. Since the U.N. Charter and the Universal Declaration, the international community within the United Nations through 1988 has agreed to 68 multilateral "instruments" (declarations, recommendations, resolutions, conventions, covenants, charters, and protocols) on human rights. The purpose of these specialized instruments is to define the human rights listed in the Universal Declaration -- plus some new ones -- explicitly enough to be incorporated into the national law of states parties to the agreements.[11]

The main distinction among instruments is that *declarations* (including recommendations and resolutions) are non-binding, while *conventions* (including covenants, charters, and protocols) are binding. The former merely

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[10] 630 F.2d 876 (2d Cir. 1980); Sieghart, *Lawful Rights,* 61, 113-14; David P. Forsythe, *Human Rights and World Politics* (Lincoln, NB: University of Nebraska Press, 2nd ed., 1989), 4.

[11] Counting the new Convention on the Rights of the Child (1989). United Nations, *Human Rights: A Compilation of International Instruments* (New York: U.N. 1988). ST/HR/1/Rev.3. Sales No. E.88.xiv.1. Idem, *Human Rights: The International Bill of Human Rights* (New York: U.N. 1988). DPI/925. Idem, *Human Rights: Questions and Answers* (New York: U.N. 1988). DPI/919. Idem, *Human Rights Machinery: Fact Sheet No. 1* (New York: U.N. Centre for Human Rights, 1987).

set standards or norms, while the latter enact law in the form of treaties. In U.S. Constitutional practice, it is sufficient for the President to sign a declaration, but a treaty requires both the President's signature and the Senate's advice and consent. A convention is obviously a much more serious commitment, though a declaration can have vital significance in preparing the way for a convention, as we have seen in the case of the Universal Declaration.

Among the 68 instruments, there are now some 22 obligatory treaties on human rights. All of these 22 are currently in force, having been ratified by the requisite number of states for each treaty. These obligatory treaties (with dates of adoption and entry into force and numbers of ratifications as of 1988) are as follows:

Table 1. Binding International Instruments

Treaty	Adopted	In Force	Ratifs.
International Covenant on Civil and Political Rights (hereafter, Political Covenant)	1966	1976	87
Optional Protocol to Political Covenant	1966	1976	41
International Covenant on Economic, Social, and Cultural Rights (Economic Covenant)	1966	1976	92
International Convention on the Elimination of All Forms of Racial Discrimination (Convention against Racial Discrimination)	1965	1969	124
International Convention on the Suppression and Punishment of the Crime of Apartheid (Convention against Apartheid)	1973	1976	87
International Covenant against Apartheid in Sports	1985	1988	33

Treaty	Adopted	In Force	Ratifs.
Convention on the Elimination of All Forms of Discrimination against Women (Convention on Discrimination against Women)	1979	1981	94
Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)	1948	1951	98
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1968	1970	30
Slavery Convention of 1926	1926	1927	67
Protocol Amending the Slavery Convention	1953	1953	52
Slavery Convention of 1926 as Amended	1953	1955	85
Supplementary Convention on the Abolition of Slavery . . .	1956	1957	102
Convention for the Suppression of the Traffic in Persons and . . . Prostitution	1949	1951	59
Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture)	1984	1987	33
Convention on the Nationality of Married Women	1957	1958	55
Convention on the Reduction of Statelessness	1961	1975	14
Convention relating to the Status of Stateless Persons	1954	1960	34
Convention relating to the Status of Refugees	1951	1954	100
Protocol relating to the Status of Refugees	1967	1967	101
Convention on the Political Rights of Women	1952	1954	94
Convention on Consent to Marriage . . .	1962	1964	35

There are also 162 International Labour Organisation (ILO) conventions (1987) bearing on the rights of labor. The main ones included in the U.N. list of instruments are:

Treaty	Adopted	In Force	Ratifs.
29. Forced Labor Convention	1930	1932	128
87. Freedom of Association and Protection of the Right to Organize	1948	1950	97
98. Right to Organize and Bargain Collectively	1949	1951	113
100. Equal Remuneration for Men and Women	1951	1953	105
105. Abolition of Forced Labor	1957	1959	109
111. Discrimination (Employment and Occupation)	1958	1960	106
122. Employment Policy	1964	1966	69
135. Workers' Representatives	1971	1973	41
151. Labor Relations (Public Sector)	1978	1981	15

The ILO also has 172 nonbinding recommendations which point the way to further progress in labor law.

Finally, UNESCO has two binding instruments:

Treaty	Adopted	In Force	Ratifs.
Convention against Discrimination in Education	1960	1962	77
Protocol Instituting a Conciliation and Good Offices Commission . . .	1962	1968	

Outside the U.N. system, the most important human rights instruments (1984) are:

Treaty	Adopted	In Force	Ratifs.
Geneva Conventions on Armed Conflict (4)	1949	1950	165
Protocols (2) to Geneva Conventions	1977	1978	67
European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)	1950	1953	21
American Declaration of the Rights and Duties of Man (American Declaration)	1948		(31)
American Convention on Human Rights (American Convention)	1969	1978	19
(American Charter of Social Guarantees -- Drafted but not adopted)	(1948)		
African Charter on Human and Peoples' Rights (African Charter)	1981	1986	35
Helsinki Accords (not binding)	1975		(35)

International Bill. The International Bill of Human Rights, as strictly defined by U.N. authorities, consists of:

Universal Declaration
Political Covenant
Optional Protocol
Economic Covenant

However, the field has been so fertile, and the regional treaties offer so much light on the definition and implementation of human rights, that certain scholars like Paul Sieghart add to the International Bill:

European Covention
European Social Charter
American Declaration
American Convention
African Charter

There is as yet no Asian Charter. These nine instruments, then, may be taken as the fulfilment of the dream of an International Bill of Human Rights.

U.S. Participation in International Instruments. The United States is a party to or has ratified the four Slavery Conventions, the Protocol relating to the Status of Refugees, the Convention on the Political Rights of Women, the Genocide Convention, the Geneva Conventions, and the Helsinki Accords. It is a party to only five of the ILO conventions, none of which are among those listed above.

The U.S. has signed but not ratified the Political Covenant, Economic Covenant, Convention against Racial Discrimination, Convention on Discrimination against Women, the Convention against Torture, the American Convention on Human Rights, the two Protocols to the Geneva Conventions, and the ILO Convention on the Abolition of Forced Labor (No. 105). It has not signed the other instruments listed above.[12]

Range of Human Rights. The instruments cover in detail the whole range of civil and political rights, and economic, social, and cultural

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[12] United Nations, *Human Rights: Status of International Instruments* (New York: U.N. 1987). ST/HR/5. Sales No. E.87.xiv.2. U.S. State Department, *Treaties in Force, 1989*; Richard B. Lillich, comp., *International Human Rights Instruments* (Buffalo, NY: Hein, 1986).

rights. New rights or more fully defined rights include: the right of self-determination; the prevention of racial discrimination and apartheid; prevention of discrimination in employment, education, and the mass media; prevention of religious discrimination; prevention of discrimination against women; prevention of war crimes, crimes against humanity, and genocide; prevention of slavery, forced labor, and prostitution; standards for the treatment of prisoners and prevention of torture; rights to nationality of married women; the status of stateless persons and refugees; the right to asylum; freedom of information; rights of labor to organize and bargain collectively; the political rights of women; protections for marriage, the family, mothers, children, and the ideals of youth; rights to social progress and development, to the eradication of hunger and malnutrition, and to fair use of scientific and technical progress; rights of disabled persons; rights to culture and cooperation; and the right to peace.

So many rights have been defined that space does not permit describing each one in detail. Others have already done so.[13] The reader should simply go to the texts, which can conveniently be found in the U.N.'s *Compilation of International Instruments*.

Difficulties with Current Definitions. The Political Covenant permits "derogation" (suspension) of certain rights "in time of public emergency which threatens the life of the nation and the existence of which is

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[13] Theodor Meron, ed., *Human Rights in International Law* (1984); Paul Sieghart, *The Lawful Rights of Mankind* (1985), 107-68; A.H. Robertson, *Human Rights in the World* (1982), 34-38, 104-14, 136-39, 178-81.

officially proclaimed" (Art. 4). The rights which may never be suspended are: the right to life; freedom from torture, slavery, servitude, and imprisonment for inability to fulfil a contract; freedom from prosecution for an ex post facto crime; freedom from non-recognition as a person; and freedoms of thought, conscience, and religion (Arts. 6, 7, 8(1 and 2), 11, 15, 16, 18). The European Convention never permits derogation from the right to life (except for "lawful acts of war"), freedom from torture, slavery, servitude, and ex post facto laws (Arts. 2, 3, 4(1), 7). The American Convention makes similar exemptions. But the very exemption of any rights from protection in the circumstances most likely to injure them (war and emergency) seems to create a dangerous precedent. The U.S. Constitution permits only the suspension of the right of habeas corpus.

The Political Covenant makes several exemptions for what the French call *ordre public* (Arts. 12, 19, 21, 22). This is another limitation on vital rights. "Public order" is hardly an adequate translation. "Public policy," "public safety," or even "reason of state" would be closer. Without such language, the French would never have acceded to the Covenant, but the phrase is a broad loophole for a determined autocrat or hysterical public. How safe are human rights if they are derogable or suspendable in accordance with public policy?

The right to property is recognized in the Universal Declaration (Art. 17) but not expressly in the Political or Economic Covenants. Agreement could not be reached in the U.N. Commission on Human Rights about the right to property, since it was the ultimate ideological issue between the West and the communist bloc in the Cold War. Labor unions and socialist parties

in the West and delegates from many developing countries were also opposed to this right. The sticking point was whether a state that nationalizes an alien's property must provide just compensation. Ultimately, the right was protected indirectly, by not permitting discrimination on the basis of property (Economic Covenant, Art. 2(2)), but permitting developing countries to set their own law on nationalization (Art. 2(3)).[14]

The right to property is also not expressly recognized in the European Convention or European Social Charter, though there are protections for the security of the home (Convention, Art. 8).[15] In the American Declaration, the right is limited to personal property (Art. 23), and in the American Convention, provision is made for the law to subordinate the use of private property to the "interest of society" and not to deprive any person of his property except upon payment of a "just compensation" (Art. 21). The definition of the right of property in international law is clearly in a state of flux.

The right of self-determination is mentioned in the U.N. Charter though not in the Universal Declaration. It appears as the prominent Art.

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[14] John P. Humphrey, "Political and Related Rights," in Meron, 190; Louis Henkin, "International Human Rights and Rights in the United States," in ibid., 40. Not everyone reads Art. 2(3) this way. Others contend it only gives developing countries license as to economic rights expressly recognized in that covenant; nationalization is not mentioned. See Arthur Goldberg's statement below at p. 72.

[15] Protocol I, however, guarantees every person the right to "peaceful enjoyment of his possessions." The state retains rights to control the use of property "in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

1 of both the Political and Economic Covenants. It was first formally defined in the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), which gives a clue to its real meaning. The Declaration was clearly a manifesto for the national liberation movement to end colonialism. "All peoples," it declared, "have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Art. 2).

This was the first of a "third generation" of human rights: political rights of individuals, economic rights of individuals, and now rights of peoples. The right of self-determination clearly had great value to the colonized peoples, as it did to the suppressed nations of Eastern Europe before World War I, but in the future it could lead to the disruption of existing states and unions by determined minorities. The right practically amounts to the ideal of government based on the consent of the governed, and is perilously close to the right of revolution. Self-determination is not recognized in the European and American Conventions.[16]

One controversial right is the right to life, as defined in the American Convention, which provides that human life shall be protected by law, "in general, from the moment of conception" (Art. 4(1)). This clause would seem to strike a blow against abortion, but actually the language is ambiguous enough, especially with the words "in general," so that abortion can still be regulated by law under virtually any conditions. Nevertheless,

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Vernon Van Dyke, 77-104.

the wording reflects the view, particularly in Catholic countries, as to what test in law most clearly defines the beginning of human life. (Incidentally, no right to die has yet been recognized internationally.)

U.S. Conformity with International Bill. The United States has long led the world in protecting civil and political rights, but has it now fallen behind in promoting economic, social, and cultural rights? Or is the U.S. actually in conformity with both the Covenants, even though it has ratified neither?

U.S. indifference to international human rights instruments is more apparent than real. Prof. Louis Henkin has pointed out that American standards are far closer to international ones than appears on the face of the U.S. Constitution and Bill of Rights. The Political Covenant, for instance, forbids torture or cruel, inhuman, or degrading treatment or punishment under any circumstances (Art. 7). The Constitution prohibits cruel and unusual punishments upon conviction for crime (Seventh Amend.), which is less strict, but Congress has provided civil and criminal penalties for torture and mistreatment during investigations or in other circumstances, and a Federal Court in the Peña case held that torture was in violation of the "law of nations."[17]

Similarly, discrimination on the basis of race, religion, or gender, in employment, housing, and public accommodations has been prohibited by Civil Rights Acts from 1866 to 1968, by state legislation, and by federal

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[17] 18 U.S.C. Secs. 241-42 (1976); 42 U.S.C. Secs. 1981-83, 1985 (1976); *Filartiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980); Henkin in Meron, 38, 45.

and state executive agencies.[18] The Supreme Court, mainly by interpretation of the due process clauses (Fifth and Fourteenth Amends.), has found in the Constitution such political rights as the presumption of innocence before being proven guilty,[19] the right to vote,[20] and such social rights as the right to travel abroad,[21] the right to marry and found a family,[22] and the right to ensure the moral and religious education of one's children.[23]

The United States, despite great Constitutional and political resistance, has become a welfare state like those in Europe. Many of the economic rights enshrined in the Economic Covenant have been satisfied in the U.S. by its dynamic economy, and others have been made legal entitlements. The states have long provided free, compulsory education. Federal and state governments provide social security, welfare assistance, and medical care. The courts have recognized the right to work[24] and the right to join a trade union.[25] The federal and state goverments provide unemployment in-

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[18] Ibid., 45.

[19] Ibid., 40: *In re* Winship, 397 U.S. 358 (1970).

[20] Ibid., *Reynolds v. Sims,* 377 U.S. 533 (1964).

[21] Ibid., *Kent v. Dulles,* 357 U.S. 116 (1958).

[22] Ibid., *Zablocki v. Redhail,* 434 U.S. 374 (1978); *Skinner v. Oklahoma,* 316 U.S. 535 (1942).

[23] Ibid., *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

[24] Ibid., 43: *Green v. McElroy,* 360 U.S. 474, 492, 507 (1959); *Allgeyer v. Louisiana,* 165 U.S. 578, 589 (1897).

[25] Ibid., *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *NAACP v. Alabama* ex rel. *Patterson,* 357 U.S. 449 (1958).

surance, set minimum wages and maximum hours of work, and set safety standards.

Saying this does not deny that there remain serious problems in the U.S. of poverty, unemployment, housing, health care, and hunger, of police abuses, prison crowding,[26] and government intimidation of critics and dissenters, but the legal standards are high. Henkin concludes: "American society would in general satisfy international human rights standards if those standards were honestly and impartially interpreted and applied."[27]

Implementation Mechanisms. How can the observance of human rights be ensured or enforced internationally? A wide range of international institutions or processes were discussed in the early days of the U.N. Commission on Human Rights, before the system of state reports was chosen. The alternatives are well worth recalling today, since they make the reporting system intelligible and constitute a rich fund of ideas for strengthening implementation in the future.

All of the proposals for improving the system being discussed today were broached in the U.N. between 1946 and 1950. These include an international appeals court of human rights, a specialized agency to process complaints, a world attorney-general or high commissioner for human rights, reconstituting the Commission on Human Rights to consist of individual experts rather than state representatives, admitting petitions from

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[26] The U.S. prison population is currently 673,565. One in 350 Americans is in jail. The figure has doubled since 1982 and no doubt will go up with the "war on drugs." Bureau of Labor Statistics quoted in *New York Times,* 11 September 1989.

[27] Henkin, in Meron, 49.

individuals and organizations, and enlarging the role of the Security Council on the grounds that violations of human rights are a threat to international peace and security. Many of these reforms or their equivalents have been tried in the European and American Conventions.[28]

Australia proposed in 1947 the creation of an international court of human rights, open to states, individual persons, and groups of persons, and having both original and appellate jurisdiction. The court's primary function would be to hear appeals from national supreme courts on questions of the "rights of citizenship or the enjoyment of human rights or fundamental freedoms." But the U.S.S.R. objected that such a court "would stand higher than the separate governments as regards the inter-relations between governments and their citizens. . . ." All delegates sensed that a world court which could effectively enforce human rights as national courts do constitutional rights presupposed a world legal order not yet in existence. "There does not yet exist," said Prof. Koretsky of the Soviet Union, "such a thing as world government."[29]

Britain then proposed that the International Court of Justice (ICJ) be involved in the process. Let a state bring an accusation of violation within the meaning of the Charter's Art. 14 to the General Assembly; let the defendant state seek an advisory opinion from the ICJ; then let the General Assembly decide by a two-thirds majority if a violation had occurred, and, if so, expel the member from the U.N. under Art. 6. But that

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[28] Sohn, "Short History," 120-69.

[29] Ibid., 122, 126-28.

was felt to be too cumbersome and draconian.[30]

France suggested that the U.N. should establish an investigatory commission or international bureau of human rights, composed of "independent persons of eminent repute," who would receive complaints from individual victims or non-governmental organizations. The commission's attorney-general should then represent the individual before the ICJ. India proposed a similar commission to receive individual petitions of grievances and then refer them to the ICJ; it would finally be up to the General Assembly to "pronounce such remedies and relief in the matter as it may deem fit." The Commission on Human Rights itself and the U.N. Secretariat recommended that the Commission become an internal agency for processing state complaints, and this is what eventually was done.[31]

Uruguay developed the notion of an international attorney-general or public prosecutor into a proposal to establish a high commissioner for human rights, who would receive complaints from governments, individuals, and organizations, initiate proceedings before a treaty-specific supervisory committee, supervise general observance, make investigations, and conciliate. The high commissioner was to be a kind of world ombudsman or tribune of the people. Nothing came of this proposal by 1950, but it was revived by Costa Rica in 1965, and like others retains potential for the future.[32]

India proposed that the Security Council "be seized of alleged viola-

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[30] Ibid., 123.

[31] Ibid., 125.

[32] Ibid., 94-101, 141-42, 153-54.

tions of human rights, investigate them and enforce redress within the framework of the United Nations." This was consistent with Security Council responsibilities but soon proved impracticable because of the veto and Cold War.

State Reporting System. It was the United States that made the modest proposal which eventually became the reporting system in the Political Covenant. The U.S. simply suggested that the states parties to the treaty submit reports to a committee of other parties on the "application of the convention and on the position of their law and practice regarding the rights stipulated," and that the Commission on Human Rights be empowered to "recommend to states measures to give effect to the convention [covenant]."

Over years of negotiation, the system was reduced to its lowest common denominators. The complaint process under the supervisory committee was made optional for participating states. Individual access was only permitted under an optional protocol. The committee was to be composed of independent jurists or experts, but they were to be nominated and elected by states parties, not an independent agency. "States that had assumed the obligations laid down in the Covenant," said Mrs. Roosevelt, "were entitled to elect their own committee."[33]

The right of petition by individuals or organizations, even though they were the ones most likely to be wronged, was denied except under the optional protocol. Prof. Cassin of France argued that individual petitions were necessary because "a complaint by a State might have serious political

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[33] Ibid., 122, 145.

consequences." The Danish delegate said that if the right to complain were confined to states, "all violations of human rights would assume a political character."

> Weaker States would never lodge complaints against stronger States, while friendly States would abstain from mutual denunciations. In those circumstances it was doubtful whether the protection of human rights would be effectively ensured.

The Indian delegate confirmed this view and answered the objection that individual petitions would swamp the U.N.: "Machinery for screening petitions" could be devised. Mrs. Roosevelt, for the United States, did not want to ask too much of states by admitting such access: "Governments would not act irresponsibly and arguments would be presented in an orderly manner."[34]

No legal enforcement or action on individuals was permitted by the Big Three. "States which were prepared to assume the obligations in the Covenant," Mrs. Roosevelt said, "should not be compelled to accept elaborate enforcement machinery." The British, too, were opposed to international legal enforcement, on the grounds that it might lower the prestige and authority of national law courts, which were the first line of defense for human rights and fundamental freedoms. The Russians rigidly maintained that any international legal measures would constitute an unacceptable interference in the domestic affairs of the state.[35]

By 1951, the shape of the implementation system was effectively settled, though differences over the nature of rights delayed adopting the

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[34] Ibid., 135-36, 141.

[35] Ibid., 149, 154.

Covenants for fifteen years. Mr. Sørensen of Denmark summed up what had been achieved on implementation this way:

> [During] the discussions on implementation it had been accepted as a basic principle that States parties to the Covenant should not be required to submit to judicial decisions as having binding force with regard to matters covered by the Covenant. It had been agreed that the international organs concerned should have only fact-finding and conciliatory powers.[36]

Model System under Political Covenant. These principles can be well perceived by inspecting Arts. 28-45 of the Political Covenant and the Optional Protocol. States parties to the Covenant "undertake" to submit an initial report on their compliance and additional reports when the Human Rights Committee requests (not necessarily annually). The reports "shall" be submitted to the U.N. Secretary General and hence to the Committee, and the Secretary General "may" transmit relevant "parts" to the specialized agencies for their information (not action). The Committee "may" then comment on the reports to the states, and the states in turn may reply (Art. 40). The system is entirely confidential and largely voluntary.

A state may, however, accept the optional clause (Art. 41) recognizing the competence of the Committee to receive complaints from other states accusing it of violating human rights. Then an elaborate confidential procedure must be followed: communication between the parties, conciliation by the Committee, and within twelve months another round of reporting. If the violation is still not resolved to the satisfaction of the states parties, the Committee "may" appoint an ad hoc Conciliation Commission to lend its good offices (Art. 42). In the worst case, if after another twelve

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[36] Ibid., 159.

months the matter is still not resolved, the Commission merely reports its views of the facts and of an amicable solution to the Committee, and in another three months the parties in dispute must notify the chairman of the Committee "whether or not they accept the contents of the report of the Commission."

The Optional Protocol, by contrast, allows *individuals* who claim that their rights have been violated and who have exhausted all domestic remedies to communicate with the Human Rights Committee (Art. 2). Again the Committee undertakes confidential communications with the state alleged in violation of the Covenant, but it can take no more action to resolve the dispute than to "forward its views to the State Party concerned and to the individual" (Art. 5).

The Human Rights Committee, nevertheless, has made quiet progress in beginning to address the great bulk of human rights abuses. In its first five years (1977-82), the Committee received 124 communications alleging abuses in 13 states parties; 54 communications were held to be admissible, and "views" (final decisions on the merits) were published in 31 cases. Most (21) were in reference to Uruguay, and the next most (3) to Canada. All the Uruguayan cases (which dealt with serious instances of detention and torture) were settled (after the lapse of two years typically) by a Committee decision that Uruguay was obligated to provide "effective remedies." The cases were adjudicated by Committee experts with exemplary fairness.[37] Addressing the bulk of human rights abuses world-wide, however,

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[37] U.N. Human Rights Committee, *Selected Decisions under the Optional Protocol* (New York: U.N., 1985).

will clearly require much greater state adherence to instruments like the Political Covenant.

Gradient of Reporting Mechanisms. The above system is not the weakest but it is one of the weakest of all those for the implementation of human rights. (The Genocide Convention, for example, has a weaker report system.) Similar reporting systems are found in the more important human rights instruments. These are too numerous and elaborate to describe authoritatively, as others have done,[38] but a simpler account can be presented here by arranging the instruments along a rough gradient of increasing effectiveness.

The main criteria in the following somewhat subjective ordering are whether the members of the supervisory committee or other body serve in their personal capacity (as opposed to being under state instructions), whether individuals and non-governmental organizations are granted the right of petition, whether publicity of a final report is allowed, and whether legal enforcement is accepted. The small size and very brief sessions of the various supervisory committees are immediately evident. Full names, dates in force, frequency of meetings, numbers of parties or size of supervisory body, and type of representative (state, expert, international civil servant, or judge) as of 1988 are given:

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[38] Louis B. Sohn, "Human Rights: Their Implementation and Supervision by the United Nations," in Meron, 369-98; Van Dyke, 159-240; Forsythe, 45-101; Robertson, 60-69, 86-92, 139-52.

Table 2. Gradient of Effectiveness of Instruments

Treaty and Supervisory Body	In Force	Frequency	Size Rep.
U.N. Charter	1945		159 states
General Assembly	1946	3 mos/yr	159 states
Special Committee on Decolonization	1961	7 mos/yr	22 states
Special Committee against Apartheid	1963	sessional	18 states
Special Committee to Investigate Israeli Practices in the Occupied Territories	1969	hearings	3 states
Committee on the . . . Rights of the Palestinian People	1975	sessional	20 states
Economic and Social Council	1946		54 states
Commission on Human Rights	1946	6 wks/yr	43 states
Commission on the Status of Women	1946	3 wks/2yrs	32 states
Sub-Commission on the Prevention of Discrimination and Protection of Minorities	1947	4 wks/yr	26 expts.
Working Groups (as on Enforced or Involuntary Disappearances)	1980	sessional	5 expts.
Special Rapporteurs	1967	ad hoc	1 expt.
Ecosoc 1503 Procedure	1970		54 states
Working Group of above Sub-Commission	1974	1 wk/yr	5 expts.
Sub-Commission on PDPM (as above)	1947	4 wks/yr	26 expts.
Commission on Human Rights	1946	6 wks/yr	43 states
Secretariat	1945		
Centre for Human Rights (Geneva)	1982	continuous	UN office
High Commissioner for Refugees	1951	continuous	UN office
International Covenant on Economic, Social, and Cultural Rights (Economic Covenant)	1976		92 states
Committee on Economic, Social, and Cultural Rights	1985	1 sess/yr	18 expts.
International Covenant on Civil and Political Rights (Political Covenant)	1976		92 states
Art. 41 (State accusation)	1979		21 states
Op. Protocol (Individual petition)	1976		41 states
Human Rights Committee	1977	3 sess/yr	18 expts.

Treaty and Supervisory Body	In Force	Frequency	Size Rep.
Convention against Discrimination in Education	1962		77 states
Protocol Instituting a Conciliation and Good Offices Commission	1968	standing	11 expts.
Convention on the Elimination of All Forms of Discrimination against Women	1981		94 states
Committee on the EAFDW	1982	2 wks/yr	23 expts.
Convention against Torture . . .	1987		23 states
Art. 21 (State accusation)	1987		10 states
Art. 22 (Individual petition)	1987		10 states
Committee against Torture	1987	1 sess/yr	10 expts.
Convention relating to the Status of Refugees	1954		100 states
Protocol	1967		101 states
Supplementary Convention on the Abolition of Slavery . . .	1957		102 states
Working Group of Sub-Commission on PDPM	1947	4 wks/yr	26 expts.
Convention on the Elimination of All Forms of Racial Discrimination	1969		124 states
Art. 14 (Individual petition)	1969		12 states
Committee on the Elimination of Racial Discrimination	1969	2 sess/yr	18 expts.
International Convention on the Suppression and Punishment of the Crime of Apartheid	1976		86 states
Group of Three	1976	5 days/yr	3 states
Geneva Conventions on Armed Conflict (4)	1950		165 states
Protocols (2)	1978		67 states
ILO Convention on the Right to Organize and Bargain Collectively	1951		113 states
Committee of Experts on the Application of Conventions and Recommendations	1927	3 wks/yr	18 expts.
Other ILO conventions . . .	. . .		
Helsinki Accords	1975		35 states
Follow-up Conferences	1977, 1980, 1986		35 states

Treaty and Supervisory Body	In Force	Frequency	Size Rep.
American Convention on Human Rights	1978		19 states
Art. 45 (State accusation)	1978		8 states
Art. 62 (Court jurisdiction)	1978		9 states
Inter-American Commission on Human Rights	1959	8 wks/yr	7 expts.
Inter-American Court of Human Rights	1979	2 sess/yr	7 judges
European Social Charter	1965		13 states
European Convention for the Protection of Human Rights and Fundamental Freedoms	1953		21 states[39]
Art. 25 (Individual petition)	1955		17 states
Art. 46 (Court jurisdiction)	1958		19 states
Protocols (8)	1952-85		most
European Commission of Human Rights	1953	as needed	21 expts.
Committee of Ministers	1949	sessional	21 states
European Court of Human Rights	1953	on appeal	21 judges

Generally, these instruments are arranged from the most "political" (Committee to Investigate Israeli Practices) to the least offensive to states (ILO Conventions, European Convention). Representation by states, suitable for the political organs of the U.N., is gradually replaced under the instruments by experts serving in their individual capacity though nominated and elected by states parties. It is evident from the dates that the international protection and promotion of human rights is very new. In some cases, like the Committee against Torture, it is so new that hardly enough time has elapsed to judge its effectiveness.

Judging by the numbers of states parties that have accepted the vari-

[39] See footnote 44, p. 37.

ous conventions and optional clauses, it is clear that the world is far from implementing a universal system for the protection and promotion of human rights. Only in the case of the European Convention is adherence complete (21 parties out of 21 members of the Council of Europe). The adherents to the Political Covenant number an impressive 87, but that is just over half of the nations in the world. The United States is hardly alone in its reluctance to participate in the new international system.

Considering the world-wide abuses of human rights which are revealed daily in the newspapers and public media, it is evident that this system has as yet had little effect. For example, the Ecosoc 1503 Procedure, which does permit U.N. response to individual communications that are reliably attested to reflect patterns of gross violations is circumscribed by state representatives conducting the procedure. In its first ten years of operation the procedure had produced only *one* public exposure of a violation (that of Malawi in 1980). In the next ten years, it produced one more (Equitorial Guinea).[40] We will deal with the record in the next sections. The most effective procedures are found under the ILO, American, and European Conventions. What is distinctive about the latter instruments, and what is the secret of their success?

ILO Model. The International Labour Organisation, founded in 1919, began to conceive its mission in terms of human rights with the Philadelphia Declaration of 1944. Its members have agreed to set uniform standards

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[40] Sohn, in Meron, 391.

for the regulation of working hours, adequate wages, equal pay, freedom of association, unemployment, social security, and other labor issues. Some 162 ILO conventions and 172 recommendations have been agreed to. According to its constitution (Art. 19), the conventions must be submitted to national parliaments for ratification. The U.S. is a party to five, mostly dealing with the labor of seamen.[41]

To monitor compliance, the ILO requires periodic reports from governments to international supervisory committees composed not solely of representatives from those same governments, as in bodies organized under the U.N. Charter. The ILO committees are composed of representatives of government, business associations, and labor organizations. Moreover, unlike practice under most U.N. instruments, copies of the reports are sent directly to national associations of employers and workers, who are permitted to send their comments back to their government and the ILO. There is thus a channel for critical information from responsible sources affected in the reports, which is rare elsewhere, at least not until after delays of years.

The ILO assessment organs -- the Committee of Experts on the Application of Conventions and Recommendations, the International Labour Conference Committee, and the Governing Body -- are quite independent. So quietly and efficiently does the system work that government representatives rarely make disruptive protests at the proceedings. (Before the recent changes in Eastern Europe, the socialist governments there did make frequent protests against the working of the Committee of Experts. Neverthe-

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[41] Robertson, 185; *Treaties in Force, 1989*.

less the ILO procedure was usually completed.) Over one recent period of fourteen years, some 1,400 improvements in national practice were made. Complaints have been heavy in recent years about restrictions on freedom of association, but 55 discrepancies were eliminated. There is a large corpus of international labor law.[42]

Model of European Convention. The European Convention guarantees 19 rights; the U.N. Political Covenant, 23. The lists are somewhat different in the two instruments, reflecting the modern flux in notions of justice in different polities. Europe, which enforces human rights strictly, has chosen a brief list. The U.N. list is wider: the right to life is hedged with a safeguard for abolition of the death penalty (Political Covenant, Art. 6(6)); the provision for due process of law is fairer (Art. 14); the right to marry, including civil equality of husband and wife, is more explicit (Art. 23); the right to vote and participate in government is better stated (Art. 25); rights to humane treatment (Art. 10), of minorities (Art. 27), and of aliens (Art. 13) are not found at all in the European Convention; the "principles" of self-determination (Art. 1), being a person before the law (Art. 16), and equality before the law (Art. 26) are also unique in the U.N. document.[43]

On the enforcement of human rights, however, the European Convention is far more advanced than the Political Covenant. As of 1988, most of the

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[42] Robertson, 184-90.

[43] Protocol No. 7 to the European Convention, however, adds rights concerned with due process, participation in government, and aliens. Prof. Frederic L. Kirgis counts 24 rights protected under the European Convention.

states parties (17 of 21) had accepted the right of individual petition (Art. 25), and even more (19 of 21) had accepted the compulsory jurisdiction of the European Court of Human Rights (Art. 46).[44] The key to effectiveness is individual access. In the first 25 years of the European system, there were only ten state-to-state applications, but there were 9,231 individual ones, 234 of which were held to be admissible. State actions have resulted in such action as the restoration of democracy to Greece after the rule of the colonels (1967-1974). Individual applications have led to small but significant improvements in national laws of pre-trial detention (West Germany and Austria, 1971), trade union freedoms, vagrancy, military discipline, sex education, freedom of the press, judicial proceedings, and the like.[45]

The process is briefly as follows. A state or individual complaint goes to the European Commission of Human Rights, a body of experts serving in their personal capacity (not under government instruction). If the Commission finds the complaint admissible (Art. 27), it has the power to conduct hearings and investigations in order to ascertain the facts (Art. 28) -- a power not granted the U.N. Commission by the Political Covenant. The European Commission then attempts through the exercise of good offices to reach a friendly settlement. If unsuccessful, it issues a confidential

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[44] By 1990, there were 23 European governments associated in the Council of Europe. Prof. Kirgis gives the counts as 22 of 23 and 21 of 23 respectively.

[45] Ibid., 98-105. The European Court of Human Rights should not be confused with the European Court of Justice, which is an organ of the European Communities.

report to the Committee of Ministers of the Council of Europe, or it may originate an action in the European Court of Human Rights. (The analogous U.N. practice would be for the Commission or one of the treaty committees to submit its report to the Security Council or to the ICJ.)

If the case goes to the Committee of Ministers, the Committee, which of course *is* composed of state representatives, will decide what measures are required to correct the discrepancies and will specify the time for corrective action. If that fails, it may publish the Commission's report. The ultimate sanction is expulsion of the member state from the Council of Europe (Statute, Art. 8). This was actually done in the case of Greece in 1970.[88]

Only the European Commission or a state may bring a case before the European Court of Human Rights -- not an individual. The state must have previously accepted the jurisdiction of the Court. If a case comes before the Court, the Court may not order remedial measures, like those of the Committee of Ministers; but a Chamber (seven judges) may award damages (Convention, Art. 50). The judgment is transmitted to the Committee of Ministers, which is responsible for its execution.

The European Convention is a proven model for the implementation of human rights. Its success is based on a well defined list of civil and political rights and on the real cooperation of governments in assuring the protection of these democratic rights of their people. A lively process of challenge and response has developed to improve the legal order in Europe.

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[88] Ibid., 89-96.

Many volumes of case law have been produced. No states claim immunity from the necessity of occasional scrutiny of their domestic practice. The protection of human rights in Europe has been one of the foundations of the post-war peace.

Model of American Convention. Greater powers are possessed by the new Inter-American Court of Human Rights, which, if the state has accepted its jurisdiction, may reach a *decision* on an alleged violation. The American Court may order interim corrective measures in "cases of extreme seriousness and urgency." It may also order final remedies, damages, and reinstatement, though it cannot impose sanctions. The Court issues an annual report to the General Assembly of the O.A.S., which can serve as punitive publicity. One unusual feature of the American system is that the right of individual petition is standard, while the state right of accusation is optional (Art. 45). Only states parties and the American Commission, however, may bring a case to the American Court -- not individuals.

Helsinki Accords. A final note on the Helsinki Accords of 1975. These are not treaty law -- legally, they are equivalent to a declaration -- nothing is binding and there are no legal undertakings. There is no committee to receive periodic reports. The Accords were concerned primarily with security and coexistence in Europe in the absence of a peace treaty formally ending World War II. Human rights were of secondary concern.

Yet the fundamental freedoms in Baskets I and III,[47] which the

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[47] Basket I, on Security in Europe, includes Secs. VII and VIII on such human rights as self-determination, religious liberty, rights

signatories pledged to "promote and encourage" if not "respect," became an inspiration for dissident groups like Charter 77 in Czechoslovakia and Helsinki Watch in Moscow, who demanded their human rights. Increased demand for human rights has plainly been a major factor in the astonishing liberalization and rise of parliamentary parties competing with or sometimes replacing communist parties in Eastern Europe in 1989. Many leaders, including President Mikhail Gorbachev of the Soviet Union, have hailed the "end of the Cold War." That a mere declaration, in a context of putative national commitments to settle the Cold War, could have such revolutionary effects in building peace in Europe and the world is proof of the power of the idea of human rights at the present juncture of history.

We are living at a time, as Arnold Toynbee wrote in his essay "Encounters between Civilizations" in 1948, when the radiation of Western civilization over all the globe has been met by a counter-radiation from all the submerged civilizations. Out of the extraordinary mixing of peoples and cultures is arising the beginnings of a new world society. The same human rights recognized (in Toynbee's terms) in the Western, Eastern Orthodox, Muslim, Hindu, Buddhist, Chinese, Japanese-Korean, and other surviving civilizations are a potent symbol of world society aborning.[48]

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of minorities, rights of trade unions, and security against terrorism. Basket III, on Cooperation in Humanitarian and Other Fields, deals with human contacts, information, culture, and education. Blaustein et al., *Human Rights Sourcebook*.

[48] Arnold J. Toynbee, *Civilization on Trial* (New York: Oxford, 1948), 213-216.

III. General Problems of Compliance

> "What the United Nations is trying to do is revolutionary in character. Human rights are largely a matter of relations between the state and individuals, and therefore a matter which has been traditionally regarded as being within the domestic jurisdiction of states. What is now being proposed is, in effect, the creation of some kind of supra-national supervision of this relationship between the state and its citizens."
>
> -- John P. Humphrey, 1948[49]

National Sovereignty. Human rights -- at least traditional civil and political rights -- are limitations on the powers of government. If we include the new economic, social, and cultural rights, some human rights are demands on the powers of government. The first are negative rights, the second positive. Both set standards for government action in the interests of the people, are increasingly enforceable in the courts, and hence limit the absolute national sovereignty of states.

Governments are most likely to abuse human rights. Individual invasions of the rights of fellow citizens are easily controllable by government exercising its proper functions. The great problem for the international community is to control government abuses. Leaders of the state are individuals, too, and hence are subject to domestic law and, more indirectly, to the developing international law of human rights. But in

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[49] John P. Humphrey, "International Protection of Human Rights," *Annals of the American Academy of Political and Social Science,* 255 (January 1948): 21.

practice the apparatus of executive and military power in the modern state is so great that officials can long be shielded from punishment for abuses of power. The solitary individual, undergoing interrogation in a remote prison, is a helpless figure.

Opposed to international supervision of human rights is a powerful political tradition of national sovereignty. Sovereignty is not a mindless survival from an earlier age, but a living heritage which under many names people vividly feel and instinctively defend. People are proud of their painfully won national independence. They honor the constitutional government that has established the rule of law within their country. Americans are just as jealous of their cherished liberties as Russians are of their social guarantees, as are Swedes or Danes of their mixed systems.

All politically well organized peoples are reluctant to accept international scrutiny of a traditionally domestic matter like rights. If the international agency is not absolutely impartial, like the finest national court, then why should any nation lay bare its own conduct to such external view? And even if the international community is impartial and upholds a higher standard, people naturally fear that a need will be demonstrated for domestic reform. This is uncomfortable. Nations are not accustomed to plucking the great plank from their own eye while they can point to the speck in their neighbor's.

Forty-one Democracies in the World. The United States especially has a strong tradition of what historians call "American exceptionalism." The Pilgrims fled from Europe to the New World in order to worship God as they

pleased. Thomas Jefferson proclaimed the rights to life, liberty, and the pursuit of happiness before any other founders of democratic republics. Lincoln defended the Union as "the last, best hope on earth." When Americans now look out upon the world, they find about 41 states that in their judgment are "fully democratic"; another 31 are "partly democratic"; 48 are "authoritarian"; and 20, "totalitarian."[50] These numbers may be shifting with the recent upheavals in the communist bloc, but the pattern is clear. Why should the United States adhere to common international standards with other countries so different and even hostile to American values?

Acceptability of International Standards. The answer basically is that the new international standards of human rights are not hostile to American values, but rather confirm and extend them to others. U.S. adherence to all the treaties would improve the quality of life for the American people no less than adherence would for the Poles and the Ethiopians.

The second answer is that the new instruments can help to establish justice as the fundamental condition for world peace. The U.S. could exercise leadership in building such a world, which by the nature of human rights will inevitably be more democratic.

The third answer is that it is not for Americans to judge the whole world, but rather to join with others in international institutions that can reach common judgments. As under national law at its best everywhere no person is allowed to be a judge in his own cause, so under desireable

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[50] David P. Forsythe, *Human Rights and World Politics* (1983), 194.

international law, no nation should be its own judge. A proper respect for the opinions of humanity compel all to submit to a common international law. The test of an acceptable common system, which may not be the U.N. system as presently evolved, is how well does it protect the rights of minorities, including that ultimate minority of one -- the individual human being?

Interests in Compliance. If the new international human rights standards are acceptable, the next problem is implementation. How is it possible to *bind* states? There is no superior Leviathan to compel states by superior power to adhere to international law. Responsible statesmen must be convinced that their state has an *interest* in compliance. They will not sign or support ratification of a human rights treaty -- or adhere to its terms once ratified -- if they do not believe the treaty will contribute to such basic interests as defense, prosperity, or the general welfare. A moral argument is not enough. The persuasive argument must be rooted in political realities. That most modern democracies, liberal and socialist, have been established to protect the rights of their people should incline statesmen to a favorable view of human rights.

Citizens to Lead. States or governments are not the beneficiaries of human rights policies -- citizens are. A national leader receives little in return for accepting the limitations and obligations of a human rights treaty compared to the immediate pay-off of a trade agreement or an arms sale. But prestige could be a benefit to the statesman, especially if the citizenry clamored for adherence. No doubt, for increasing national adher

ence to the new human rights instruments, citizens will have to lead. Human rights have always been rooted in the struggles of people against their governors. The dialogue, the dialectic, between citizens and statesmen will continue to be the engine of change in the political implementation of human rights. Citizens are the ones who must bring the power of the state into the service of their own human rights.

Kinds of Implementation. There are two (conceivably three) kinds of human rights implementation:

1. National legal enforcement in accordance with treaty obligations;

2. International reporting mechanisms, public discussion, and civic education, which encourage national enforcement;

(3. Eventual enforcement directly on individuals according to the world rule of law, perhaps through a stage of international adjudication of appeals from national rulings.)

The first, at the present stage of international development, means practically the continual calculation of *national interest* by statesmen, who can denounce international agreements usually within a year, and even earlier if in their judgment the existence of the nation is in danger. History is littered with "unperfected" (that is, failed) treaties.

The second is equivalent to *public opinion,* which is weak, but not so weak that states have not made carefully constrained efforts to avoid it under most U.N. instruments. Public opinion -- or the consent of the governed -- is the foundation of the modern state and must grow if international organization is to be strengthened.

Thirdly, the *rule of law,* familiar at the national level, is only an

ideal now at the world level but is the logical culmination of the other two mechanisms.

World Law. Historically, rights have been asserted before the establishment of the state; the protection and promotion of rights has followed. In the present crisis of world order, human rights have been asserted by leading legal publicists and enlightened statesmen before the establishment of a world state. If the international community can develop into a democratic guarantor of the rights of humanity, there is no reason why we should not look forward to a world organization empowered to enact law reaching to individuals.

Public Opinion: The Case of South Africa. Public opinion has not yet been fully engaged to support the human rights instruments. If we look at just two of the more important and widely ratified instruments -- the Convention against Racial Discrimination and the Convention against Apartheid -- it is evident that, despite impressive U.N. efforts, the problems have barely been touched.

Under the first treaty, the Committee on the Elimination of Racial Discrimination was set up in 1969. It has vigorously pursued its mandate, but almost all the communications have been from states parties, since only twelve to date recognize the right of individual petition. The Committee did not embarrass states with too close an inquiry into individual cases; it requested demographic data only, and limited its corrective action to

appointment of conciliation commissions under Art. 12.[51]

In an effort to raise world consciousness, the General Assembly declared 1973-83 as the Decade for Action to Combat Racism and Racial Discrimination. World conferences on this theme were held in Geneva in 1978 and 1983. A programme for action in a second decade (1983-93) called for action against apartheid in education, the mass media, minority groups, law, and non-governmental organizations. The offenses of South Africa may now be better known to the public, but no one could doubt, in looking about at national societies in the North, that the programme has had little effect on improving the lot of blacks.

The United Nations has been opposed to apartheid since 1946. In 1963, the Security Council imposed a voluntary arms embargo against South Africa, and in 1977, on the grounds that the racial policy had become a threat to international peace and security, the Council imposed a mandatory one. Various committees and funds of the General Assembly attempt to monitor and relieve the situation. Under the Convention against Apartheid (1976), the states parties undertake to enact legislation against similar practices elsewhere and to prosecute accused offenders (Arts. 4-5). The Convention, however, could not affect South Africa, which has continued to defy the entire international community. South Africa has developed its own armaments industry, including, reportedly, capacity to produce nuclear weapons. It relinquished its claim to Namibia in 1989 less because of U.N. opposi-

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[51] A.H. Robertson, *Human Rights in the World* (1982), 62.

tion than because of U.S. diplomacy, which withdrew support when Cuban troops agreed to leave Angola.

Whether U.N. agitation on the issue of apartheid has affected South African consciousness is an imponderable, but it does not seem to have had greater weight than the struggles of the black majority in South Africa for their rights. President F.W. de Klerk, on announcing the release of Nelson Mandela, emphasized the latter: ". . . only a negotiated understanding among the representative leaders of the entire population is able to insure lasting peace," he said. "The alternative is growing violence, tension, and conflict." Mr. Mandela, in his first speech on release from prison, credited the struggle of the ANC and the "mass democratic movement," but he also thanked "the world community for their great contribution to the anti-apartheid struggle."[52]

International standards surely have served to legitimate the black struggle. Even if the eventual triumph of black majority rule in South Africa, like that in Rhodesia and Angola, proves a victory for human rights, no one can doubt that much will remain to be done to eliminate racial attitudes in the rest of the world.

National Interests: Peace Based on Human Rights. That the *national interest* includes human rights is largely based on the argument that the protection and promotion of human rights serves the cause of peace. This view is affirmed in the U.N. Charter itself, where "respect for the princi-

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[52] *New York Times*, 3 and 12 February 1990.

ple of human rights" is said to be one of the "appropriate measures to strengthen universal peace" (Art. 1(2)). The view is reaffirmed in most of the human rights instruments. But is it really true? The standard view in the era of *Realpolitik* is that peace is based not on respect for human rights, but on maintaining a balance of economic, political, and military power. This antithesis amounts to a virtual Kantian antinomy at the present crisis of world history.

Both the U.S. and the U.N. see dangers in the world, but the U.S. sees danger mostly in the march of expansionist communism (this may be changing), while the U.N. sees danger in international anarchy and the consequential neglect of global problems like human rights. The one would base peace on power; the other, on adherence to international human rights instruments and other international agreements.

The U.S. (people, Congress, and Bush administration) think that the nation is quite free in the field of foreign policy (is sovereign), and hence has before it certain *choices* of unilateral and multilateral diplomacy, one of which is cooperation with the United Nations.

The U.N. emphasizes international *obligations*, since the Charter is a binding treaty and the Universal Declaration is now "customary international law," even though all states are not yet parties to all instruments.

The U.S. feels that the U.N., because of its Third World majority, is biased against the West and especially against the United States. As Daniel Patrick Moynihan wrote after his service as U.S. Ambassador to the U.N. in 1975, the United Nations has become a "dangerous place."

The U.N. vigorously defends its impartiality. Perhaps, because of years of frustration over the New International Economic Order, Zionism, and apartheid, the majority is learning what has been discovered about political bodies throughout history -- that tyranny springs not simply from a king or a remote parliament or a capitalist class but from the human propensity to corruption by power, which can infect any majority. (Apparently, the long unchecked, single party communist states are learning this truth; the authoritarian states cannot be too far behind.) Thomas Pickering, the new U.S. Ambassador, senses the changed atmosphere when he calls the U.N. now a "useful place."[53]

The argument of the United Nations, asserted in the U.N. Charter, the Universal Declaration, most instruments, and by many advocates, is that, in the language of the Declaration, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."

This is an argument sometimes better appreciated in the converse: denial of human rights is a threat to the peace, as in South Africa under apartheid, in the Soviet Union while Andrei Sakharov and other dissidents were being persecuted, and in Vietnam, Iran, and El Salvador, where U.S. support for repressive regimes did not lead to lasting security. Many claim that neglect of economic rights is a cause of war. Pope John Paul II said at the United Nations in 1979:

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[53] *New York Times*, 15 January 1990.

> The Universal Declaration of Human Rights has struck a real blow against the many deep roots of war, since the spirit of war in its basic primordial meaning springs up and grows up, grows to maturity where the inalienable rights of men are violated. . . . The first of these systematic threats against human rights is linked in an overall sense with the distribution of material goods. This distribution is frequently unjust, both within individual societies and on the planet as a whole.[54]

The positive version of this economic argument is the liberal one that development will produce an increased aggregate of national income and hence improve human rights indirectly.[55] The view at UNESCO is that peace is based on the free flow of information; war is caused by its destruction and then misunderstanding. Others say that *democracy*, not peace necessarily, is strengthened by promotion of human rights. Still others reverse the whole sense of the argument, saying, as the Teheran Conference on Human Rights did in 1968: "Peace is the underlying condition for the full observance of human rights, and war is their negation."[56]

The relation of human rights to peace is a tangled historical question. After World War II, it was universally felt that Nazi abuses against human rights must never be allowed to occur again. But had such abuses been a cause for war before Germany attacked its neighbors? Had Stalin's abuses threatened the peace in the Thirties? If we look at the history of Europe since the French Revolution, must we not say that the doctrine of natural rights has been the cause of much struggle for justice, indeed for

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[54] Quoted in Forsythe, *Human Rights and World Politics*, 202.

[55] Trubek, in Meron, 223.

[56] Quoted in Robertson, *Human Rights in the World*, 229.

democracy, but not for peace? Similarly, in the world since 1945, since human rights have been used to justify national liberation movements and international sanctions against certain countries for their domestic policies, how can we say, with the U.N. Charter, that "respect for equal rights" is a basis for "friendly relations among nations" (Art. 1(2))?

The truth seems to be that human rights *are* a basis for peace among peoples who have established liberal or socialist democracies to protect them, but where these rights differ, as they do between the United States and the Soviet Union or between black Africa and white supremacist South Africa, the differences are certainly an aggravating factor in relations and threaten to be a cause for war. The Cold War, ideologically, has been a struggle about the priority of political or economic rights. Only an understanding that all human rights are "indivisible and interdependent," as the U.N. declared in 1977, is apt to lead to peace. What is really lacking is not opportunity to strengthen international law, but the will to do so. The U.N. is a great symbol of faith in international norms and institutions, but it no longer inspires trust.

IV. U.S. Policy Favoring Human Rights

> "The overriding interest of the United States is a world environment favorable to the kind of democratic system that the American people want to maintain and develop, and respect for human rights is one of the major characteristics of such an environment."
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> -- Vernon Van Dyke, 1970[57]

History of U.S. Human Rights Policy. The history of U.S. policy in the field of human rights may be divided into three phases:

1. Leadership under Franklin D. Roosevelt and later Eleanor Roosevelt, 1941-1951;
2. Bricker amendment controversy and retreat, 1951-1957;
3. Reaction to Nixon-Kissinger *Realpolitik* and restoration of American values, including human rights, to U.S. foreign policy, led by Donald Fraser and Jimmy Carter and continued by Ronald Reagan, 1973-1989.

Franklin D. Roosevelt articulated the Four Freedoms as an Allied war aim in World War II -- Freedom of Speech, Freedom of Religion, Freedom from Want, and Freedom from Fear. The first two freedoms were a broad rubric for civil and political rights; the third and perhaps the fourth, for economic and social rights.

Freedom from Fear was to be mainly guaranteed by a new international security organization. Roosevelt guided the politics of establishing the United Nations, based on "faith in fundamental human rights," until his

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[57] Vernon Van Dyke, *Human Rights, the United States, and World Community* (1970), 257.

death. Mrs. Roosevelt thereafter chaired the U.N. Commission on Human Rights, which drafted the Universal Declaration in 1948. The United States continued to participate actively in the drafting of the two Covenants, the Convention against Racial Discrimination, the American Convention, and other instruments. The U.S. contributed the basic idea of the reporting mechanism when stronger means of implementation were rejected as too intrusive.

Bricker Amendment Controversy. But in 1951, Senator John Bricker (R., Ohio) introduced a U.S. Constitutional amendment that would have fundamentally restricted the application of the draft covenant on human rights and all other human rights instruments. Bricker feared that if the proposed covenant were approved as a treaty and became part of the supreme law of the land, it would not safeguard but endanger the rights and freedoms of the American people.

Frank E. Holman, president of the American Bar Association in 1948-49, articulated the issues behind the Bricker amendment. Holman was struck by the small but articulate movement for world government in the aftermath of the atomic bombing of Hiroshima and Nagasaki. He was suspicious of any attempt by "ardent internationalists," using "a variety of devious maneuvers and clever resorts to semantics, to transform the United Nations into a 'World Government,'" which could infringe on the sovereignty and independence of the United States.[58]

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[58] Duane A. Tananbaum, "The Bricker Amendment Controversy: Its Origins and Eisenhower's Role," *Diplomatic History*, 9 (Winter 1985):

Holman pointed out that human rights under the proposed covenant were derogable during emergencies -- something which the Constitution does not permit (except for the right of habeas corpus).[59] He was especially concerned that the language in the Charter and draft covenant of "human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" would supersede state statutes that conflicted with such provisions. Just this happened in 1950 in the widely reported case of *Sei Fujii v. State of California,* where a California lower court held the state's alien land law unconstitutional on the grounds that it violated the U.N. Charter.[60] Moves were already afoot in the President's Committee on Civil Rights to challenge Jim Crow segregation laws in the U.S. on the same grounds.[61] Holman objected to the economic rights in the draft covenant as an attempt "to promote state socialism, if not communism, throughout the world."[62]

Others, like Senator Pat McCarran (D., Nev.), warned that under the

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[59] Vernon Van Dyke, *Human Rights: The United States and World Community* (1970), 134.

[60] 217 Pac.2d 481 (1950); Sohn and Buergenthal, *International Protection of Human Rights* (1973), 934-48. The case was reversed two years later, but the implications were plain, and *Sei Fujii* is still a source of controversy. 38 Cal.2d 718, 242 P.2d 617 (1952). Cf. "Mr. Sei Fujii Comes into His Own: Short Cut to World Law," *Common Cause* (Chicago), 4 (November 1950): 200-05.

[61] Tananbaum, 76, 79.

[62] Ibid., 75.

U.N. Charter the U.S. federal government would be obliged to enact laws regulating and controlling education, civil rights, and intrastate commerce. The American Medical Association warned against implied socialized medicine, and the National Association of Manufacturers worried that the federal government would increase its regulation of business and of labor-management relations.[63] Bricker called the covenant a "blueprint for tyranny."[64] Holman later explained that the purpose of the Bricker amendment was "to expose and unmask the insidious propaganda campaigns, begun several years ago, of quietly innoculating the American people with the virus of 'one worldism'!"[65]

The Bricker amendment controversy continued throughout the Fifties, though the amendment itself was narrowly defeated (at one point by one vote). One consequence was that the U.N. draft covenant was divided into two -- a political covenant and an economic covenant -- since the U.S. clearly was not going to ratify a treaty of economic rights that would supercede the Constitution. Politically, the Senate has remained quite suspicious of the long-range consequences of approving treaties with direct effects on the lives of American citizens. The Genocide Convention, sent to the Senate by President Truman in 1949, was an immediate casualty of the battle. President Kennedy sent the relatively innocuous Supplementary Con-

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[63] Ibid., 80.

[64] Van Dyke, 134.

[65] Ibid., 140.

vention on the Abolition of Slavery, the Convention on the Political Rights of Women, and the ILO Convention on the Abolition of Forced Labor to the Senate in 1963, but the first was not passed until 1967, the second until 1976, and the ILO convention was never passed. The ABA did not reverse its opposition to the Genocide Convention until 1976, nor to the Political and Economic Covenants til 1979.

Reaction to Kissinger-Nixon Realpolitik in Vietnam War. A long hiatus of U.S. leadership on human rights ensued. The Cold War, which was ideologically a conflict over the right principles of government, including the nature of human rights, became the dominant international political reality. After the Vietnam War, a popular and Congressional reaction against the *Machtpolitik* of the Nixon-Kissinger years began to turn the tide. Something was wrong with bombing Hanoi over Christmastime in 1972 in order to win a point at the peace conference in Paris. At bottom was a public demand to return traditional American values to the conduct of foreign policy -- to restore morality and idealism to a place with realism in the conventional wisdom of American foreign policy.[66]

From 1970 to 1975, Congress pressed to end the Vietnam War, passed the War Powers Act over the President's veto, deflected U.S. involvement in Angola, embargoed arms to Turkey after its invasion of Cyprus, scrutinized the CIA, and very nearly impeached the President. In succeeding years, as

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[66] David P. Forsythe, *Human Rights and U.S. Foreign Policy: Congress Reconsidered* (Gainesville, FL: University of Florida Press, 1988), 1.

David P. Forsythe has shown, Congress passed six general statutes on human rights, of which Sec. 502B of the Foreign Assistance Act was typical. Congress also adopted country-specific legislation making military, economic, and financial aid conditional on human rights progress in nations such as El Salvador, Nicaragua, Guatemala, Mexico, Cuba, Haiti, Argentina, Chile, Uganda, Pakistan, Laos, Cambodia, South Korea, and the Soviet Union. In addition, Congress passed function-specific legislation, such as the act creating the Bureau of Human Rights and Humanitarian Affairs in the State Department, another requiring the Bureau to prepare annual *Country Reports*, and another prohibiting use of U.S. funds for police training and prison work.[67]

President Carter clearly wished for the United States to pursue a disinterested, consistent human rights policy.[68] "Peace is not merely the absence of war," he said in his acceptance speech as Democratic nominee in 1976. "It is the unceasing effort to preserve human rights."[69] In his inaugural address, Carter declared: "Our commitment to human rights must be absolute."[70] He affirmed U.S. human rights policy at the United Nations in

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[67] Forsythe, 1-7.

[68] Mowrer, 16; Muravchik, 57; James Mayall, "United States," in R.J. Vincent, ed., *Foreign Policy and Human Rights* (Cambridge: Cambridge University Press, 1986), 173.

[69] Quoted in David Heaps and American Association for the International Commission of Jurists, *Human Rights and U.S. Foreign Policy: The First Decade, 1973-1983* (New York: By the assn., 1984), 15.

[70] Ibid., 16.

March 1977, at the O.A.S. in April, and at Notre Dame University in May. Carter signed the two U.N. Covenants and the American Convention on Human Rights in 1978, and sent them, with the Convention against Racial Discrimination (which President Johnson had signed in 1966), to the Senate for ratification.[71]

But once in office Carter soon discovered, as when he attempted to intervene on behalf of Andrei Sakharov in the Soviet Union, that he had to temper U.S. demands for the protection of human rights with considerations for American strategic interests, and this realistic consideration led to further compromises with Idi Amin's Uganda and traditional U.S. allies like Iran, the Philippines, South Korea, Indonesia, and Pakistan.[72]

President Ronald Reagan initially tried to repudiate Carter's human rights policy, reflected in the decision to let the post of Assistant Secretary of State for Human Rights go vacant through most of 1981. But within a year public demand compelled the new administration to return to a balanced human rights policy, symbolized by the appointment and confirmation of Elliott Abrams to the post. The administration attempted to overlook human rights abuses in friendly if authoritarian governments, like Argentina, Chile, Guatemala, the Philippines, and South Korea, while severely criticizing those in Marxist countries like Nicaragua and the Soviet Union.[73] The *Country Reports* dropped economic rights from their purview.

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[71] Ibid., 17.

[72] Muravchik, 23-39, 44.

But after the assassination of opposition leader Senator Benigno Aquino in the Philippines, the Reagan administration distanced itself from President Ferdinand Marcos, who fell in 1986. In El Salvador, the administration was legally compelled to submit certification statements to Congress that the Salvadoran government was making "concerted and significant" efforts to protect "internationally recognized human rights" and achieving "substantial control" over its own security forces to end abuses.[74] By the mid-Eighties, then, concern for human rights had met the test of a bi-partisan foreign policy.[75]

Using the U.N. to Implement Human Rights Policy. When the U.N. Commission on Human Rights had completed its work on the Universal Declaration and had turned to the draft covenant (at that time still singular) in 1950, the Indian delegate, Mrs. Mehta, made a prescient comment about any unilateral national human rights policy outside the U.N., which is quite relevant to the Carter and Reagan experience. She began with the question whether states alone or individuals, too, should have access to a U.N. body to present their grievances. Then she passed on to the necessity for an international organization:

> If the right to complain is restricted to states, perhaps there will be no complaints as the states will find it difficult to complain against one another. The question then will arise as to who will supervise the observance of human rights on behalf of

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Forsythe, 54, 62; Heaps, 33; Mowrer, 35-37.

Forsythe, 86-89, 148.

Forsythe, 162; Heaps, 35, 37; Mayall, 165.

> the United Nations if there is no permanent machinery to do so? Will the states members undertake the work and keep an eye on each other? Instead of ensuring peace, this will lead to intrigues and even to war. A permanent body is, therefore, absolutely necessary and will afford a better protection of human rights.[76]

This warning applies to all U.N. members but particularly to the United States, which, forty years after leading the human rights movement, has yet to fully participate in the U.N. human rights order.

The United Nations can offer long-term utility to U.S. human rights policy. If human rights initiatives prejudice in the short term the maintenance of defensive alliances and other strategic interests, is not the alternative to support human rights through neutral U.N. bodies, which necessarily aim at progress in the long term?

One major problem with a human rights policy is consistency, which neither Carter nor Reagan could achieve. As the legal protection of rights domestically depends on the impartiality of judges and juries, so internationally a stronger U.N. would be better fitted to the task of protecting and promoting human rights. A strong and impartial U.N. could defend human rights consistently without injuring sensitive U.S. strategic interests in, say, China, South Korea, Saudi Arabia, Israel, Panama, Chile, Poland, and even the U.S.S.R. U.N. action would obviate the charge that the U.S. is cynically exploiting human rights for geo-political advantage.

Foreign military and economic aid has proved an "unwieldly instrument," and financial aid in the international financial institutions is out

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[76] Sohn, "Short History," 140.

of U.S. control. One young scholar has studied some 28 cases of punitive use of aid and finds a slight *worsening* of the human rights situation world-wide by 1981.[77] Why not adopt the Optional Protocol to the Political Covenant and allow the individual petition process to handle violations?

American businessmen have complained to the Bureau on Human Rights that human rights restrictions are an "idealistic interference in business practices" that "give competitors a trade advantage."[78] The solution, then, is not to abandon human rights, but to make U.N. sanctions universal and complete.

The Reagan administration restricted refugees entering the U.S. to 70,000, citing "limits to compassion."[79] The U.S. could hardly be expected to honor the rights of refugees without bias if other nations did not. U.N. standards must be agreed to and enforced *universally*.

It may be objected that the U.N. General Assembly, which approves human rights instruments, like any political assembly is unreliable without strong leadership. The solution, then, is for the United States to provide that leadership, which may require general U.N. reform, including reform of the Assembly's voting system to reflect the realities of national power. Perhaps the expansion of NATO into a general European security organization, including the Eastern European countries and even the Soviet Union,

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[77] Muravchik, 176-77.

[78] Forsythe, 53.

[79] Ibid., 70.

could be a model for eventual U.N. reform.[80]

Senate Debate on Four Human Rights Treaties. In 1978, President Carter sent to the Senate for advice and consent the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the American Convention on Human Rights.[81] The debate was most revealing about the current state of U.S. opinion on international human rights instruments. Carter included with the treaties about thirty reservations, declarations, and understandings, the most serious of which was a reservation to each of the treaties that it was "not self-executing," that is, not directly enforceable in U.S. courts without implementing legislation. Since this reservation seemed to defeat the purpose of the treaties, which was to accept new obligations to bring U.S. practice into conformity with international standards, many international lawyers wondered if ratification with reservations were a serious commitment.[82]

Reservations. There were seven reservations, two declarations, and one understanding for the Political Covenant, three reservations, three

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[80] Alan K. Henrikson, "The Creation of the North Atlantic Alliance," in John Reichart and Steven Strum, eds., *American Defense Policy* (Baltimore, MD: Johns Hopkins University Press, 1982), 296-320.

[81] U.S. Senate, *Four Treaties Pertaining to Human Rights: Message from the President of the United States,* Senate Docs. C, D, E, and F, 95th Cong., 2nd sess., 25 February 1978. Republished in Lillich below.

[82] Richard B. Lillich, ed., *U.S. Ratification of the Human Rights Treaties: With or Without Reservations?* (Charlottesville: University of Virginia Press, 1981).

declarations, and an understanding for the Economic Covenant, and so on. A *reservation,* it was made clear in the course of the debate, is a "limitation upon a treaty or convention compatible with the object and purpose of that instrument," though it "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state." A declaration is an "expression of views . . . without modifying any of the rights or obligations under the treaty or convention." An understanding is a statement "to clarify or explain how certain provisions ought to be interpreted or applied in a treaty or convention." A reservation is distinct from the other two by its binding legal character.

Nations commonly make reservations when ratifying or acceding to treaties in order to indicate how their national law should be interpreted with respect to certain treaty clauses that are worded incompatibly. According to long usage, if another state party does not formally object to another's reservation, the treaty as modified by the reservation is in force between them. If a party does object, the *clause* to which the one has made a reservation is not in force between the *two parties,* but the treaty as a whole, with the exception, is in force between them (unless the first party objects to the entire treaty with the reservation). The treaty is in force without exception among all the other parties who have made no objection. The U.N. volume, *Status of International Instruments,* is filled with such reservations. The reservation of France to Art. 20 (against war propaganda) of the Political Covenant is typical:

> The Government of the Republic declares that the term "war," appearing in article 20, paragraph 1, is to be understood to mean

> war in contravention of international law and considers, in any case, that French legislation in this matter is adequate.[83]

In general, reservations seem to be transitional devices to bring very diverse national practices into conformity with necessarily singular international instruments.

But it is possible that some reservation could be so worded as to utterly defeat the treaty. Senator Jesse Helms (R., N.C.), who was the leading opponent of these human rights treaties and of the Genocide Convention, understood that a reservation "excludes or varies the legal effect of one or more provisions" of the treaty. The problem for the Carter administration was to formulate reservations that would be strong enough to meet the legitimate concerns of a majority of the Senate who were still opposed to international scrutiny of U.S. human rights practice, yet not so strong as to make meaningless U.S. adherence to these treaties. The political -- rather than legal -- nature of the proposed reservations was emphasized by spokesmen from the State and Justice Departments in the debate.

Arthur Rovine from State explained to a group of irate international lawyers that there were strong feelings in the Senate about treaty legislation on domestic matters, the proper scope of the treaty power, federal-state relations, and the like. Majority sentiment among the American people was opposed to U.S. ratification of these treaties at all, with or without reservations, Rovine said. The reservations proposed were not very

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[83] United Nations, *Human Rights: Status of International Instruments* (New York: U.N., 1987), 35. ST/HR/5. Sales No. E.87.xiv.2.

different than those of other liberal democracies, like Denmark or the U.K., who were "serious about their obligations." Reservations simply indicate where a nation cannot immediately comply. In time, they may be withdrawn or become inapplicable. The reservation that these treaties are "non-self-executing," argued Rovine, is a non-issue, for all treaties may require implementing legislation. In Canada, treaties are not law until the provinces enact appropriate legislation. In the U.K., Parliament must implement by legislation. Most U.S. implementing legislation is already on the books. Without the reservations, he concluded, "we would have the Bricker Amendment all over again."[84]

Roberts B. Owen of State testified that there was no conflict between these four international human rights treaties and the U.S. Constitution, Bill of Rights, Fourteenth Amendment, Civil Rights Acts, or current economic and social policies. The United States should ratify because disregard of human rights abroad may constitute a "threat to our own peace and prosperity." Enforcement was only possible through "international scrutiny and review," by means of reports on compliance, analysis of reports by U.N. bodies, requests for further information and new reports, and by a complaint procedure for states and individuals. Most human rights, Owen argued, are already protected under U.S. federal and state law; the reservations cover the remaining required changes. Even with reservations, "U.S. ratification will represent a highly constructive step forward." It will

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[84] Lillich, 55, 57, 60; cf. Jack Goldklang of Justice, ibid., 62-67.

prevent U.S. backsliding, remove foreign reproaches, and permit American participation in the implementation mechanisms.[85]

Very different was the spirit of Senator Helms' testimony. Helms had inherited the mantle of the late Senator Sam Ervin (D., N.C.), who had long opposed the Genocide Convention as a threat to the U.S. Constitution via the treaty power. Helms proposed to *amend* both the Political and the Economic Covenants in order to recognize the right of property, as in the Universal Declaration. The maneuver was tantamount to a rejection, since amendment would require renegotiation of the entire treaties. (Commentators pointed out that Arts. 2(2) and 25 of the Economic Covenant were sufficient to protect private property.) Helms used his time to grill Pat Derian on human rights abuses in Nicaragua. "How many former national guardsmen have been executed inside Nicaragua? . . . Have the Sandinistas supplied arms to the Marxist terrorists in El Salvador? . . . How often are military supplies arriving from Cuba in Managua?"[86]

Clearly, Helms -- and the Senators who followed his lead -- were interested less in the ideal merits of human rights instruments than in their practical effect on real abuses occuring in an area of U.S. strategic concern. After all, Helms knew, the Sandinistas immediately made Nicaragua a party to the Political Covenant, and Cambodia had been a party to the

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[85] U.S. Congress, Senate, *International Human Rights Treaties: Hearings before the Senate Committee on Foreign Relations,* Senate Advice and Consent, 96th Cong., 1st sess., 14-19 November 1979, 24-26.

[86] Hearings, 7, 58-59.

Genocide Convention at the time of the Pol Pot massacres. International agreements had little restraint on those countries' conduct.[87]

Legal opinion was predominantly in favor of these treaties. Of 38 witnesses who appeared before the Foreign Relations Committee plus 46 prepared statements, only four were opposed (including Senator Helms and Phyllis Schlafly). Of the 80 in favor, about half accepted the reservations. Such prominent professors of international law as Thomas Farer, Louis Henkin, Oscar Schachter, Louis B. Sohn, Thomas Buergenthal, and David Weissbrodt were firmly opposed to any reservation that might even appear to be an evasion of treaty obligations. The Lawyers Committee for International Human Rights prepared a particularly forceful analysis opposing reservations. Some of this opposition is worth recalling since the same issues come up again and again.[88]

Non-Self-Executing Reservation. The general U.S. reservation, applying to the whole of each treaty, was that the substantive articles were "not self-executing." To this, the Lawyers Committee replied: "This reservation is not constitutionally required. It will unnecessarily delay U.S. compliance with some provisions and set up unnecessary political obstacles to U.S. compliance generally. Many articles will require Congressional implementation, but some might not. Determination of what is or what is not self-executing should be made article by article, after careful

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[87] Nicaragua acceded to the Political Covenant and Optional Protocol in 1980. Cambodia acceded to the Genocide Convention in 1950.

[88] Ibid., 48-54.

examination of the language."[89]

But what was really objectionable was the notion that the United States could participate in an international legal order without having to make any changes in its own conduct. The purpose of human rights instruments was not merely to compel others to adhere to higher standards.

> The purpose of treaties is to undertake new obligations, in this case to conform U.S. behavior to the international standard. The mere fact that a treaty provision makes a change is not a reason for a reservation. If a particular change is unacceptable on its merits, then a reservation should be entered. One reservation (to Art. 20 [of the Political Covenant]) may be required by the Constitution. One or another change the United States may not be prepared to promise. But there should be no general reservation to change.[90]

The same objection was made to the general reservation to the Economic Covenant, even thou economic rights or "needs" are intrinsically non-self-executing.[91]

Freedom of Speech Reservation. Another reservation provided that "nothing in this Covenant shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States." This reservation was unnecessary, many international lawyers argued, since Art. 5 of both Covenants expressly provides that "there shall be no restriction . . . on the pretext that the present Covenant does

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[89] Ibid., 52.

[90] Ibid., 49.

[91] Ibid., 54.

not recognize such rights or recommends them to a lesser extent."[92]

The only reservation that even the international lawyers admitted might be needed was one to Art. 20 of the Political Covenant, which prohibits war propaganda. A free speech reservation was needed for Art. 20 since the First Amendment limits speech only if it incites to violence or other unlawful action.[93]

Federal-State Reservation. A reservation setting out the federal-state relationship in the U.S., the lawyers held, was confusing and unnecessary. Few, if any, matters covered by the Covenants are subject exclusively to state jurisdiction. Under the Fourteenth Amendment, civil and political rights are subject to Congress and the federal courts. The scope of the treaty power is broad but clarified in *Missouri v. Holland*.[94]

Other reservations, declarations, and understandings were of far less significance than the above. There was a reservation to the Political Covenant's Art. 6, limiting the death penalty, for instance: "The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment." But this, said the commentators, was "objectionable." "Its purpose can only be to reserve the right to execute pregnant women, or children under 18. It would make the United States position seem ridicu-

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[92] Ibid., 50.

[93] Lillich, 22.

[94] Hearings, 49, 52.

lous."[95]

Support for Ratification. Arguments in favor of the four treaties were generally that ratification would enable the United States to resume its rightful place of leadership in the field, appoint expert representatives to the Human Rights Committee, participate in the Helsinki Process without being exposed to the charge of hypocrisy, and contribute to peace in the Americas.

President Carter said of the two Covenants: "Our failure to become a party increasingly reflects upon our attainments, and prejudices United States participation in the development of the international law of human rights." Of the Convention against Racial Discrimination he said: "Ratification of this treaty will attest to our enormous progress in this field in recent decades and our commitment to ending racial discrimination." Of the American Convention: "United States ratification of the Convention will give us a unique opportunity to express our support for the cause of human rights in the Americas."[96]

Ambassador Charles Yost emphasized the need of American delegates and ambassadors to raise the issue of human rights without being reproached for not adhering to U.N. instruments and participating in the work of the human rights bodies. There is an "impression that we do not practice what we preach, that we have something to hide, that we are afraid to allow outsid-

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[95] Ibid., 50.

[96] Lillich, 85-86.

ers even to inquire whether we practice racial discrimination or violate other basic human rights."[97]

Former Justice and U.N. Ambassador Arthur Goldberg argued that failure to ratify has been a "great embarrassment" to the U.S. at international meetings, especially the Helsinki follow-up conferences. The Helms amendment on property he felt went too far: "The United States understands that under the covenant everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property. Nationalization of U.S. business property abroad is covered not by the Covenants but by the international law of eminent domain. The "symbolism" of U.S. ratification would have "great value in East-West relations."[98]

Deputy Secretary of State Warren Christopher asserted that the treaties, like the Genocide Convention, were in the national interest: "Concern for human rights is one of the foundations of the greatness of our Nation." It is also one foundation of U.S. leadership in the world. "To preserve and enhance that leadership role, we must demonstrate our willingness to make human rights a matter of international commitment and policy and not solely a matter of domestic law."[99]

Senator Claiborne Pell (D., R.I.), Co-chairman of the Commission on

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[97] Hearings, 4.

[98] Hearings, 10-17.

[99] Ibid., 18-19.

Security and Cooperation in Europe and a liberal counterfoil to Senator Helms on the Foreign Relations Committee, argued that the two U.N. Covenants had been politically dead until revived by the Helsinki Process, but now the U.S. was seriously hampered by its refusal to ratify. "The sincerity and credibility of the United States in the field of human rights are seriously impaired by the fact that we have not yet ratified the Covenants."[100]

Prof. Thomas J. Farer, an expert member of the (multilateral) Inter-American Commission on Human Rights, argued that ratification of the American Convention would not add substantially to the international obligations already assumed by the U.S. under the Protocol of Buenos Aires, approved by the Senate. The U.S. is also a party to the O.A.S. Charter, which is the original authority for the Commission. Reservations, Farer said, will only intensify the appearance of "national hypocrisy." Similar Soviet reservations would produce a "field day of ridicule" in the West, he said. How can the U.S. ask others to make great changes, when Americans will not make small ones? "The blanket refusal to contemplate any change implies arrogant disregard for the opinions of the rest of mankind about the content of human rights." Ratification would "affect the normative atmosphere to a not trivial degree."[101]

These debates happened to take place in late November 1979, just after

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[100] Ibid., 61.

[101] Ibid., 94, 96.

American diplomatic personnel were taken hostage in Teheran. President Carter immediately responded by freezing Iranian assets in the U.S. He also started an international legal process that would lead to the International Court of Justice in 1980 and to the arbitral U.S.-Iran Claims Tribunal that met for years. The *New York Times* recalled in an editorial that in 1965 the Senate somehow found the time to ratify the Vienna Convention on Diplomatic Relations, which in 1979 was the "legal bedrock of the American case against the embassy seizure in Iran." Even more important, said the *Times,* were the four treaties then before the Senate on human rights, which Carter had called the "heart and soul" of American foreign policy. Hence, the argument for ratification could be reduced to one word: "Teheran."[102]

The four human rights treaties were never reported out by the Foreign Relations Committee. All the arguments above could not prevail against the Senate majority that Senator Helms led. One might ask whether the defeat was a defeat for the reservations, so that next time around the treaties might be considered without reservations, or was it a defeat for the treaties as a whole?

Genocide Convention. Reservations played a vital role when the Senate finally approved the Genocide Convention in 1986. Eight separate reservations were made. One exempted regularized armed conflict from the charge of genocide; a second prevented interpretation of harm to a group to mean

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[102] *New York Times,* 24 November 1979. Iran since 1975 has been a party to the two Covenants.

even a single individual; a third clarified the term "mental harm"; a fourth required implementing legislation before deposit of the instrument of ratification (done in 1988); a fifth affirmed the necessity of another treaty to establish an international penal tribunal; a sixth forbade extradition of Americans for "political" acts not crimes under U.S. law; a seventh required U.S. assent to ICJ jurisdiction in any dispute involving the United States; and an eighth provided that "nothing in the convention requires or authorizes legislation or other action by the United States of America prohibited by the constitution of the United States as interpreted by the United States."[103]

While the convention was hedged with these qualifications, both Senator Claiborne Pell (D., R.I.), who fought for the convention in the Foreign Relations Committee, and Senator William Proxmire (D., Wis.), who had spoken out for it on the Senate floor every day since 1967, emphasized its symbolic effects.[104] Approved finally by a vote of 83 to 11, the Genocide Convention gave human rights activists hope that this historic vote would break the U.S. logjam on ratifying human rights conventions. The larger issue of U.S. participation in a meaningful international human rights order remains for the future.

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[103] U.S. Senate, Debate on the Ratification of the Genocide Convention, 99th cong., 2nd sess., *Congressional Record*, Vol. 132, nos. 14-15, 18-19 February 1986, pp. S1273-1284.

[104] Ibid., S1262.

V. General Proposals for Improving Compliance

"Human rights is the dominant political philosophy in the world today."

-- Michael Donelan, 1982[105]

Improving the compliance of all nations with international human rights instruments must be a function both of reducing "bias" in the United Nations itself and of eliminating "selectivity" in U.S. policy. Improvement of other nations' policies, too, is necessary but is beyond the scope of this study. The United States, because of its revolutionary origins, history of expansion of Constitutional rights, and political power in the world today, unavoidably is a leader in the rise or fall of human rights.

Reducing U.N. Bias. Many Americans, at least since Daniel P. Moynihan's *A Dangerous Place* (1978), have complained about "politicization" of the United Nations. What he meant is that the influx of many new nations into the U.N. by the decolonization process has produced majorities in the General Assembly and other organs and bodies that do not share Western commitments to liberty and free markets, but demand redistribution of wealth through extortionate development programs. The division between the West, on the one hand, and the communist East and underdeveloped South, on the other, was symbolized in Moynihan's view by the "Zionism is racism" resolu-

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[105] Michael D. Donelan, "Reason in War," *Review of International Studies*, 8 (January 1982): 57.

tion of 1975.[106]

The New International Economic Order (NIEO, 1973), with its modest demand for some global redistribution of wealth (actually only 0.7 percent of each developed nation's GNP was to be committed to official development aid) was the lead sally of the new global political actors. Fundamentally, their demand was for greater world respect for economic human rights.

The communist bloc, with its primary commitment to economic rights, was a natural ally of the developing countries, though it shrunk from a full aid program on the grounds that underdevelopment was a heritage of imperial exploitation and hence the responsibility of the West to correct. Thus, the Third World, through its appeal to Western guilt, and the industrialized, socialist East, through its refusal to share the burdens of its adversaries, have made the U.N. a "dangerous place" for the United States and its allies. It fell to President Carter to squelch the NIEO mostly through benign neglect.

But actually the U.N. has always been politicized. In the early years (1945-60), when the U.S. and its European and Latin American allies easily dominated the organization, the majorities were strongly pro-Western. Issues discussed in the U.N. were largely those of "freedom." One of the consequences was that the Economic Covenant (like the Political Covenant) was not adopted until 1966. What Americans now object to, as the Soviets did in the early years, is *bias*. Politics is part of the struggle to

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[106] Daniel Patrick Moynihan with Suzanne Weaver, *A Dangerous Place* (Boston: Little, Brown, 1978), 113-19, 126-29, 169-99.

establish universal standards, as of human rights, but once the standards have been accepted, the organization to implement them can be expected to be impartial, like a respectable court of law. Here the United Nations has fallen short.

The U.N. General Assembly never passed a resolution critical of Uganda for human rights abuses during the reign of Idi Amin (1976-79) nor of Cambodia during that of Pol Pot (1975-79).[107] Actions against white Rhodesia and white South Africa have been fairly vigorous, but those were easy cases; the hard test came with offenses closer to home in the Third World where white racists were not so easily blamed. Genocidal governmental campaigns against tribal adversaries (the Tutsis and Hutu) have been reported in Rwanda (1964) and Burundi (1972). The Aché Indians in Paraguay were decimated (1975). In India, the Naga and Mizo peoples were targets of counter-insurgency war (1956-64). In East Pakistan, at least one million Bengalis were killed and ten million forced to flee by the Pakistani Army before establishment of the secessionist state of Bangladesh (1971). The inhabitants of East Timor were mercilessly slaughtered by the Indonesian Army (1979). Some 9,000 persons disappeared in Argentina and over 800 in Chile in the 1970s. It is estimated that 50,000 Nicaraguans gave their lives in the war against Somoza (1978-79), and another 30,000 have died fighting the American-supported contras (1981-89). None of these extreme

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Robin Chatterjie, "The United Nations," in R.J. Vincent, ed., *Foreign Policy and Human Rights* (Cambridge: Cambridge University Press, Royal Institute of International Affairs, 1986), 239.

cases of abuse provoked a U.N. response, largely because of the opposition of some powerful state member or bloc.[108]

The U.N. Commission on Human Rights by 1987 had passed public resolutions critical of systematic human rights violations in only thirteen nations: Afghanistan, Bolivia, El Salvador, Equatorial Guinea, Guatemala, Iran, Kampuchea, Malawi, Nicaragua, Poland, and the "pariah" regimes of Chile, Israel, and South Africa. In Africa, only Equatorial Guinea (1979) and Malawi (1985) were singled out. In Asia, there were major omissions for Vietnam, North and South Korea, and the Philippines. No Arab country was censured. Afghanistan (1984-85) was the first Soviet client state to be criticized, and Poland (1982-84) the first European country. Latin America received fairly balanced treatment, though Argentina, Cuba, and Uruguay have never been marked out.[109]

The Ecosoc 1503 Procedure, which permits some U.N. response to individual complaints that indicate reliably attested patterns of gross violations, had by 1987 produced a list of 29 countries with whom confidential action had been taken.[110] But only *two* countries had been judged so abusive of human rights that the reports were made public: Equatorial Guinea

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[108] Richard A. Falk, *Human Rights and State Sovereignty* (New York: Holmes & Meier, 1981), 159-61.

[109] Jack Donnelly, "Human Rights at the United Nations, 1955-85: The Question of Bias," *International Studies Quarterly,* 32 (1988): 293.

[110] Ibid., 294)

(1979) and Malawi in a case involving Jehovah's Witnesses (1980).[111]

One recent scholar who has made a close study of U.N. bias from 1955 to 1985 finds that discussion of civil and political rights took almost four times (20 percent) the time spent on economic, social, and cultural rights (5.5 percent), so there has not been a bias against Western liberties. But of the civil and political rights, the right to protection against racial discrimination and the right to self-determination (even though decolonization is virtually complete) took up about two-thirds of the time. In other words, Third World concerns have exceeded Western concerns for traditional liberties. (A large fraction of the remaining time is taken up with rote resolutions against the pariah regimes and routine matters.) "The only explanation I can see," writes Jack Donnelly, "is that most Third World regimes, who largely control the agenda, have almost as much to hide in their record on economic and social rights as they do in their record on civil and political rights."[112]

Considering the abuses of human rights which annually fill the reports of Amnesty International, Freedom House, and the U.S. State Department, the U.N. system in which state majorities generally determine judicial outcomes has produced a record that leaves much to be desired. Why should the United States submit to such a system?

General methods for correcting U.N. bias include: reforming the re-

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Chatterjie, in Vincent, 235; Sohn, in Meron, 386, 391.

[112] Donnelly, 279-81.

porting system throughout its long gradient, admitting individual petitions and greater non-governmental organization (NGO) participation, utilizing more experts serving in their individual capacity, and developing the rule of law. The models are the supervisory systems in the International Labour Organisation and the European Convention.

Consolidating the State Reporting System. Louis B. Sohn has made some cogent suggestions for improving the reporting system under international instruments. Under the U.N. Charter (Art. 64), all member states are required to submit periodic reports to Ecosoc on the implementation of its recommendations. Reports became increasingly infrequent, however. Under a system established in 1965 (terminated in 1981), reports were put on a staggered six year cycle: first, reports on civil and political rights; then two years later those on economic, social, and cultural rights; and then those on freedom of information.

The General Assembly from time to time requires additional reports, like those every five years to the Commission on the Status of Women. On ratifying the Supplementary Convention on the Abolition of Slavery, which the U.S. has done, states are obliged to submit a report to the Secretary General on their compliance. Under the Convention against Racial Discrimination (Art. 8), states parties are required to submit biennial reports to the Secretary General and hence to the treaty's Committee, which has powers of inquiry and conciliation.

The Economic Covenant (Art. 16) requires biennial reports to Ecosoc. The Political Covenant (Art. 40) requires an initial report and reports on

request to the Human Rights Committee, which can make comments and transmit the reports (along with state observations on the comments) to Ecosoc. If a state party accepts optional Art. 41, permitting state accusations of non-compliance, the Committee may make inquiries, attempt conciliation, and finally submit its own report to all the other states parties. There is still another procedure under the Optional Protocol (Art. 4), which permits individual petitions. Other international instruments, such as the Convention on Discrimination against Women (Art. 18) or the Convention against Torture (Art. 19), require similar reports.[113]

"It would seem desirable," writes Prof. Sohn, "to simplify these reporting systems and to consolidate them into one or two overall systems." This could be done, he suggests, by amendment of the two Covenants or, in the interim, by Ecosoc authorizing its sessional Working Group to consider reports from non-parties to the Economic Covenant, and by states parties authorizing the Human Rights Committee to consider reports from non-parties on subjects covered by the Political Covenant. As for all the other instruments, Ecosoc could recommend to the states parties that, by amendment or joint resolution, they should arrange for the Secretary General to transmit their reports to the two review bodies above.[114]

In effect, such a change would centralize the reporting system in the interest of simplification. Other concomitant changes are necessary, too,

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[113] Sohn, in Meron, 374-77.

[114] Ibid., 377-78.

in order to meet the interest of effectiveness. One would be to vest the centralized review body or bodies with common powers of dispute settlement through fact-finding and conciliation like those now provided in the Convention against Racial Discrimination (Arts. 11-14) or the Political Covenant (Arts. 41-42). This could be done by the General Assembly drafting a uniform protocol for all the human rights instruments.[115]

Granting Individual Access. Another change would be to increase public access to the present secretive, state-centered process, which makes maximum allowance to the desire of governments not to be challenged on their rights policy in the short term. Allowing individuals direct access to the system would immediately relieve many human rights abuses -- individuals, after all, are the primary victims of abuse and are supposed to be the beneficiaries of human rights standards -- and their access would help to "depoliticize" state-dominated U.N. organs and the Commission on Human Rights. The fact that in twenty years the Ecosoc 1503 Procedure has led to only two public reports, in two remote African countries, to the neglect of far more serious offenses in Latin America, the Soviet bloc, and Asia, is indicative of the problem. An open process would be far more proper.

No provision in the Charter, as Sohn points out, prevents the General Assembly, Ecosoc, or the Commission on Human Rights from considering communications from individuals or groups as the basis for discussions or recommendations. The Council of the League of Nations received petitions from

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[115] Ibid., 383-84.

members of minorities, appointing in serious cases a Committee of Three to investigate alleged treaty violations. The U.N. Commission on Human Rights could within its present mandate appoint a pre-sessional Working Group to consider which communications from individuals ought to be brought to the relevant treaty committee for discussion. The Working Group might also be authorized to make recommendations to the committee for further action. In this way, public opinion would be mobilized behind final action by the committee.[116]

Utilizing Experts in the Supervisory Bodies. The current ILO system for handling complaints indicates how a similar U.N. system might work. The ILO Constitution (Art. 19) requires all states members to submit the organization's conventions to the competent national parliament for approval of ratification and both conventions and recommendations to parliament for enactment of implementing legislation. After ratification of a convention, a state is obliged to report on its measures to give effect to the treaty, and then to report at two-year intervals on the condition of such relevant human rights as freedom of association or abolition of forced labor. Reports at four-year intervals are also required on technical matters. Even states that do not ratify a convention are obliged (Art. 19(5)(e)) to report at least once on its law and practice in regard to the subject matter of the convention. What is unique to the ILO is that states must send copies of their reports to the most representative employers' and

[116] Ibid., 391-92.

workers' associations in the country (Art. 23(2)). Thus, government, capital, and labor are all involved.[117]

Supervision begins with an examination of state reports by the Committee of Experts on the Application of Conventions and Recommendations. This is a body of nineteen individuals serving in their personal capacity appointed by the ILO Director General. Dedicated to independence, impartiality, and objectivity, they meet for three weeks each year, make confidential inquiries on doubtful points, and print their observations on the rest, which are circulated to all the members at the ILO Conference. Results have been impressive: since 1964, some 1,400 discrepancies have been quietly rectified.[118]

If a case is not quickly corrected, the annual Conference appoints a "tripartite" Committee on the Application of Conventions and Recommendations, which examines the experts' report and selects a limited number of serious cases for follow-up. Direct contacts are initiated (usually by the government itself). The International Labour Office then offers technical assistance on compliance, conducts fact-finding, and attempts conciliation. In difficult cases, a visitor from the ILO Office may travel to the country concerned and meet with the government, employers' associations, and labor unions. The final stage is discussion and adoption of the report by the General Conference (completing the "mobilization of shame" directed at a

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[117] Francis Wolf, "Human Rights and the International Labour Organisation, in Meron, 276-80.

[118] Ibid., 281.

recalcitrant government). Of some 222 cases handled through direct contacts from 1968 to 1979, 115 were improved.[119]

There is also a contentious procedure, by which a state member may lodge an original complaint against another member in the ILO Office. Then the ILO Governing Body will attempt to mediate or, that failing, appoint a Commission of Inquiry (three independent persons). The Commission's report is returned to the Governing Body and hence to the disputants, who have three months to accept its recommendations or appeal to the ICJ. The ultimate sanction is publication of the Commission's report.

The Governing Body, which also is tripartite, may itself initiate a complaint, which leads to mediation and inquiry as before. Since labor is represented, this avenue means that individual workers may complain to the ILO about business or state practices. An individual delegate to the General Conference may also do so (Const., Art. 26(4)). From 1961 to 1981, there were thirteen contentious cases, twelve of which were about such human rights as freedom of association, prevention of forced labor, and nondiscrimination.[120] So successful has ILO practice been that C. Wilfred Jenks predicted in 1968 that the ILO could become "the most effective executing agency of the [Economic] Covenant."[121]

Developing the Rule of Law. Another powerful analogy for simplifying

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[119] Ibid., 286.

[120] Ibid., 286-90; Vernon Van Dyke, 165-67, 173-75.

[121] Quoted in David M. Trubek, "Human Rights Law and Human Needs Programs," in Meron, 239.

and strengthening the U.N. reporting system is provided by the enforcement mechanism under the European Convention. The competence of the European Commission on Human Rights to receive individual petitions is optional (Art. 25), but all states members of the Council of Europe have now accepted it except Finland. A petition must first go to the Commission, which rules on its admissibility (Art. 27 guards against misuse). If accepted, the Commission attempts to mediate and reach a friendly settlement. If that fails, the Commission prepares a detailed report on the facts, states whether it finds a breach in the Convention, transmits its findings to the states parties and to the Committee of Ministers, but does not publish the report.

The Commission or the states parties then have three months to decide whether to bring the case to the European Court of Human Rights or to leave it in the hands of the Ministers. All states parties to the European Convention except Finland and Turkey have now accepted the compulsory jurisdiction of the Court. In inter-state disputes, states will usually appeal to the Court; in individual complaints, the Commission will. If the case is left with the Ministers, their decision is binding, and even when the Court decides, the Ministers execute.

The results have been that states subject to adverse rulings have, "virtually without exception," taken action to bring themselves back into compliance. Important cases such as *Ireland v. U.K.* (1978) and *Tyrer v.*

U.K. (1978) are typical of a large body of case law.[122] The European Court of Human Rights is grounded on the political bedrock of Western liberal democracy, so the analogy with an effective World Court may be imperfect at the present stage of world development, but principles of individual access and independent review are still relevant to the U.N.

Linking the U.N. and the People via NGOs. Lastly, the positive contributions of international non-governmental organizations (NGOs), like Amnesty International, the International Committee of the Red Cross, and the International Commission of Jurists, indicates what positive benefits might be expected from increased non-state access to U.N. bodies. International NGOs have led in bringing the world's attention to helpless peoples like the Jehovah's Witnesses in Malawi, the Kurds in Iraq, Iran, and Turkey, ministers and priests in Poland, Afghanistan, and China, aboriginal peoples in Australia, Norway, Brazil, and the United States. Generally, like the Red Cross, they are not partisans of one side or the other in the Cold War, though some ideological distinctions can be made, as between Amnesty International (Western) and the International Association of Democratic Lawyers (socialist).

The great advantage to the U.N. is that NGOs are engaged in the political process as would be improper for international civil servants. International NGOs can speak out on human rights issues when states and intergovernmental organizations cannot because of strategic interests or

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[122] Rosalyn Higgins, "The European Convention on Human Rights," in Meron, 505-511.

diplomatic propriety. NGOs are links to the world's peoples, on whose support the ultimate success of the U.N. depends. Human rights would hardly have made so much progress in the last forty years without the aid of these dedicated "peace workers."[123]

Reducing U.S. Selectivity. Since the temptation for the United States to pursue human rights according to what Jeane Kirkpatrick criticized as a "double standard"[124] is so great -- condemning abuses in authoritarian U.S. allies while ignoring those in communist states -- it might in general be wiser for the United States to abandon human rights as a criterion for military, economic, and financial aid. That is, Congress and the President could allow strategic considerations solely to determine foreign aid, as in pure *Realpolitik*, and leave human rights to the protection and promotion of the present United Nations. This is a simplistic alternative for policy.

Such a change would mean, in the case of El Salvador, for example, that neither Congress nor the State Department would set progress on human rights as a condition for aid, which would be determined solely on the basis of U.S. judgments of what was necessary for hemispheric defense, while adherence to human rights standards would be judged in O.A.S. and U.N. fora.

Congress would be reluctant to relinquish its new concern for human

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[123] Armstrong, in Vincent, 243-60; David Weissbrodt, "The Contribution of International Non-Governmental Organizations to the Protection of Human Rights," in Meron, 404-38.

[124] Jeane Kirkpatrick, "Dictatorships and Double Standards," *Commentary*, November 1979; quoted in Heaps, 32.

rights, but clearly Secs. 502B, 116, and 701, the Boland amendment, and the establishment of the Bureau of Human Rights in the State Department have not proved the most effective means to advance the universal ideals of the American people, especially when policy is placed in the hands of an administration only too habituated to treating all power as a weapon in the Cold War.

U.S. Leadership. The preferable alternative would be for Congress and the Executive to take the *lead* in restoring the ideal and the reality of international organization in a reformed United Nations. In the author's opinion, this is the proper course for U.S. policy. The U.N. can never function as it was designed to do unless what Jeane Kirkpatrick also called the "double-double" standard is erased -- the practice of condemning, under pretenses of international objectivity, the offenses of capitalism while ignoring those of the left or of the South. Time may be ripe for a renewed effort of U.N. reform. The U.N. has passed through its period of Western hegemony and now may be nearing the end of its Third World and Eastern hegemony. Thesis and antithesis are due for a synthesis.

The United States could take the lead by ratifying the human rights instruments, seeking the votes within the General Assembly or Ecosoc for resolutions that might produce a more uniform and simplified reporting system, negotiating amendments like one to the Political Covenant recognizing both public and private property, negotiating new instruments or helping to codify the large complex mass of human rights law, and in general encouraging compliance with a truly impartial U.N. system.

The U.S. should lead by example, but it does not have to be denied more "political" tactics, like the threat to withhold all contributions if the PLO were upgraded from an observer to a state in exile.[125] Majorities at the world level, too, must learn to respect minorities. The current Third World majority is highly artificial, for it is based on the antiquated rule of one-nation-one-vote. The United States, hence, is now in a minority, whose rights deserve to be protected. In time, if the community of values throughout the world can grow, like that, say, in Europe, the U.S. could lead a more substantial effort of U.N. reform. With the "revolutions of 1989" fresh in our minds, the times may be propitious.

In short, we think that both the United States and the United Nations must change their practices, in order to achieve the dream of human rights.

For the future, then, the following proposals, in increasing order of difficulty and significance for the rule of law, should be placed on the international agenda.

General Proposals: 1. Integrating the Law. The proliferation of international human rights instruments has resulted in problems of budget, program, and administration within and between international organizations. Conflicts of competence are not infrequent. The lists of human rights in the various instruments are not the same, the rights are defined differently, national, regional, and global jurisdictions are unclear and frequently ignored in practice, the reporting system is cumbersome and dila-

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[125] *New York Times,* 28 November 1989, 1 December 1989.

tory, the various supervisory committees are uncoordinated, and the hapless individuals who suffer from human rights abuses are not yet well served.

Hence, it is necessary, as Prof Theodor Meron argues, to develop an "integrated system of international treaty law governing human rights . . . Such a system would prevent unnecessary duplication, prevent conflicts between institutions, avoid differences about the interpretation and implementation of instruments adopted by different organizations, and ensure that statutory provisions concerning complex technical subjects are established and supervised by the most competent organizations."[126]

2. **Improved Coordination.** Improved coordination among existing supervisory bodies, possibly including more frequent or larger meetings of the Commission on Human Rights, as President Carter and Secretary Vance suggested in 1978, could help to reduce the backlog of cases and the consequential selectivity in U.N. responses. Such an improvement could be accomplished through internal studies and administrative rule changes.[127]

3. **Opening Up Flow of Information.** Political bias in U.N. General Assembly resolutions censuring "pariah" states like South Africa, Israel, and Chile, while neglecting worse situations in countries like Uganda and Cambodia that are embarrassing to the Third World majority, deeply injures

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[126] Meron, 23.

[127] Jimmy Carter, *Reform and Restructuring of the U.N. System: The President's Report and the Secretary's Report* (Washington, DC: Department of State, Bureau of Public Affairs, Office of Public Communication, 1978; International Organization and Conference Series, 135; Selected Documents, No. 8; Dept. of State Pub. 8940, June 1978, pp. 9, 30-31.

the organization's reputation for integrity and impartiality. To overcome such bias, three strategies might be pursued, suggests Jack Donnelly.

"First, bias can, and should be, condemned, by states and NGOs alike." No one likes to be exposed in an inconsistency, and since publicity is the U.N.'s main power, pointing out a flagrant case of bias may help to reform the system.

A second strategy would be to support procedures that resist bias, especially those that use independent experts rather than state representatives, like the Ecosoc 1503 Procedure or, better, the review committees under the specialized instruments. A third would be for states and NGOs generally to "open up the flow of information."[128]

4. Greater Use of Individual Experts. Outside of the General Assembly, Ecosoc, and the Commission on Human Rights, most of the human rights supervisory bodies are composed of individual experts serving in their personal capacities, without instructions from their national states. Most human rights instruments provide for such an expert committee, sometimes with optional powers, to review reports on compliance, make inquiries, communicate with affected parties, make recommendations, and publish findings. The system works best in the ILO, where governments, far from looking for ways to embarrass each other in the supervisory body, have come to allow their business and labor representatives to resolve their disputes themselves before ILO officials. Hence, recommendations for reform are gener-

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[128] Donnelly, 296-301.

ally quietly accepted, without outrageous publicity. Use of individual experts should be expanded in the U.N. system.[129]

5. Right of Individual Petition. Individuals are the ones who suffer human rights abuses, usually at the hands of governments. The right to petition the government for a redress of grievances was one of the most painfully won civil rights in the West. In the world at large, the right of individual petition to U.N. supervisory bodies ought to be recognized as a matter of right, as it is in the American Convention and generally has been (optionally) in the European Convention.

If it is true that, under the U.N. Charter and the Universal Declaration of Human Rights, the individual has become "subject to international law," then he or she deserves the right to communicate with the institutions of the international community. The right of petition also conforms to state interest, since no Western democratic or social democratic state can be injured by recognition of the full political and economic rights of its people. Indeed, the full enjoyment of those rights is a proven basis for peace between nations. Where the right of petition has been recognized longest -- in Europe -- it has clearly helped to halt torture in Greece and Ireland, and to improve national laws on liberty of person, fair trial, and free speech. At the U.N. level, the Optional Protocol to the Political Covenant enshrines this right and deserves wider ratification.[130]

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[129] Van Dyke, 174-75.

[130] Van Dyke, 180-85; Higgins, in Meron, 511-36.

6. NGO Access. Non-governmental organizations like the International League for Human Rights, Amnesty International, Freedom House, and World Watch, have been the heart of the struggle for human rights. They often are the only organizations to support an unknown individual suffering injustice in some remote locale. The reports of these NGOs are full of such cases calling for redress. NGOs link the U.N. to the people of the world in ways that might seem inappropriate for an international security organization of sovereign states. Hence, it is vital to provide greater access for NGOs, as for individuals, to U.N. agencies. Such access is guaranteed in the Charter (Art. 71), but that article ought not to be interpreted so narrowly that NGOs struggling for human rights are limited only to Ecosoc. They have a political role to play in the strengthening of the United Nations.[131]

7. High Commissioner for Human Rights. A High Commissioner for Human Rights was proposed by Uruguay in 1951, revived by Costa Rica in 1965, and supported by the United States as recently as 1978.[132] Like the High Commissioner for Refugees, the High Commissioner for Human Rights was conceived as a powerful, independent official who could intervene directly in international organizations on behalf of individuals. He (she) was viewed as a world attorney general -- often compared to the Swedish *ombudsman*, Soviet procurator or mediator, and even the Roman tribune of the people.[133]

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[131] Armstrong, in Vincent, 243-60.

[132] Sohn, "Short History," 105; Carter, 9, 32-33.

In 1967, the U.N. Commission on Human Rights completed a careful, limited proposal to create a High Commissioner for Human Rights. The proposal was approved by Ecosoc and sent to the General Assembly, where it has languished. The functions of the new officer were as follows:

> (a) He shall maintain close relations with the General Assembly, Economic and Social Council, the Secretary General, the Commission on Human Rights, the Commission on the Status of Women, and other organs of the United Nations and the specialized agencies concerned with human rights, and may, upon their request, give advice and assistance;
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> (b) He may render assistance and services to any State Member of the United Nations or member of any of its specialized agencies or of the International Atomic Energy Agency, or to any State Party to the Statute of the International Court of Justice, at the request of that State; he may submit a report on such assistance and services with the consent of the State concerned;
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> (c) He shall have access to communications concerning human rights, addressed to the United Nations, . . . and may, whenever he deems it appropriate, bring them to the attention of the Government of any of the States mentioned in sub-paragraph (b) above to which any such communications explicitly refer;
>
> (d) He shall report to the General Assembly through the Economic and Social Council on developments in the field of human rights, including his own observations on the implementation of the relevant declarations and instruments adopted by the United Nations and the specialized agencies, and his evaluation of significant progress and problems; these reports shall be considered as separate items on the agenda of the General Assembly, the Economic and Social Council, and the Commission on Human Rights, and before submitting such reports the High Commissioner shall consult, when appropriate, any Government or specialized agency concerned, taking due account of these consultations in the preparation thereof.[133]

This proposal was sent by the General Assembly to the Commission on

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[133] Sohn, in Meron, 372.

[134] Sohn, "Short History," 94-101.

Human Rights in 1977, and by 1981 the Commission reported that it could not reach a decision. Political leadership was obviously lacking.[135] Is there sufficient international consensus on human rights, as there is on the rights of refugees, to support such a high commissioner? In the 1990s, given further decline of the Cold War and increased public concern about global problems like the environment and human rights, this proposal could seem very useful again to states and the international community.

8. Council on Human Rights. Another proposal, once supported by the United States,[136] would be to transform the U.N. Trusteeship Council, whose work of decolonization is now nearly done, into a Council on Human Rights. Its composition and functions would necessarily be very like the existing Commission on Human Rights, except that a Council might meet more often and acquire funds now allocated to Trusteeship. Ecosoc, by its own decision, could upgrade the Commission to a Council by a mere change of name. But to create a Council on Human Rights with greater powers and organized less "politically" in place of the Trusteeship Council would take a Charter amendment. Such a step might seem attractive to the West in order to meet constructively the current Third World demand to increase the size of the Commission from 43 to 53, further weighting it against the West.

9. World Court of Human Rights. Lastly, at some point in the future,

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[135] A/C.3/32/L.25/Rev.1 (1977); E/CN.4/L.1577 (1981); *United Nations Action in the Field of Human Rights* (New York: U.N., 1983), 249-50.

[136] Carter, 33.

it might be wise and timely to revive Australia's proposal (in 1947) to create a World Court of Human Rights. It should be an appeals court, not recognizing the right of individuals to original jurisdiction, like the European Court or Inter-American Court of Human Rights. The European Court works well because political integration is so well advanced that within the community there is general agreement about the meaning of terms in the law, like "rights."[137]

But until that process is well advanced on the world level, a World Court of Human Rights would probably raise expectations that would only be frustrated by long and contentious litigation. Disappointment with the International Court of Justice in the human rights field has inhibited proposals for such a new court. After the ICJ's adverse ruling in the Southwest Africa cases challenging apartheit in 1966, clauses providing for appeal to the World Court were removed from the Political and Economic Covenants adopted later that year, and many states in ratifying the Convention against Racial Discrimination (1965) added reservations against the Court's jurisdiction.[138]

In time, however, a properly constituted World Court of Human Rights

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[137] Van Dyke, 188.

[138] John Carey, "U.N. Protection of Human Rights after Twenty-Five Years," in Louis B. Sohn and the Commission to Study the Organization of Peace, *The United Nations: The Next Twenty-Five Years* (Dobbs Ferry, NY: Oceana, 1970), 211-12. The independence of Namibia and the completed suit by Nicaragua in the ICJ may, at time of writing, mark a relaxing of Third World opinion toward the ICJ.

could become an indispensable element in a global human rights order. The Campaign for U.N. Reform has long demanded such a court in order to strengthen the United Nations. Grenville Clark and Louis B. Sohn in their fundamental plan for U.N. reform, *World Peace through World Law*, provided for a revised ICJ, a new World Equity Tribunal, a new World Conciliation Board, and new regional courts for the enforcement of world laws on individuals. A Bill of Rights was outlined to safeguard individuals from abuses by the new U.N. legal bodies. Clark and Sohn did not think it wise to merely add such judicial bodies to the existing United Nations, but incorporated them into a comprehensive plan for the reform of the whole system, since the fundamental nature of the U.N. would change as it acquired authority over individuals. It would cease to be a league of sovereign states and become a world authority with rights and powers of its own.[139] A World Court of Human Rights for the application of the presently evolved International Bill of Human Rights, by analogy, therefore, we think would best be created as part of a general process of U.N. reform.

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[139] Grenville Clark and Louis B. Sohn, *World Peace through World Law* (Cambridge, MA: Harvard University Press, 1958, 1960, 1966), Arts. 93 and 110, Annexes III and VII, and commentaries.

Author's Conclusion

Human Rights Policy in the Long Term. The danger of human rights to peace in a nationalistic age -- the threat that differences over human rights could be used to justify a war to the finish between capitalism and communism, much like the former wars of religion -- is one reason why national leaders everywhere, including those in the United States, have chosen to pursue a minimalist foreign policy based on narrow self-interests rather than a maximalist policy based on "morality" and human rights. This is the old antithesis between Realpolitik and idealism, which George Kennan and the other architects of the containment policy thought had been settled by 1949.[140]

Human rights has clearly come back to American foreign policy by popular demand, however. The problem now is where best to pursue it? Not in Congress, we think, for as one careful scholar has concluded after a close examination of the record since 1973, Congress has "lacked the attention span, will-power, and political consensus to oversee effectively the implementation of its original intent, except in one instance: the Jackson-Vanik amendment. . . ."[141] The legislative branch is unfitted by nature for the conduct of foreign policy, which requires exactness, timeliness, and

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[140] George Kennan, *American Diplomacy, 1900-1950* (Chicago: University of Chicago Press, Mentor ed., 1951), 93-98.

[141] Forsythe, *Human Rights and U.S. Foreign Policy*, 152.

persistence. A check on the executive may have been necessary in the Nixon administration, but foreign policy should generally be conducted by the executive branch, as the Constitution provided.

Yet the Presidential administration is not fitted, either, to advance so universal a goal as the equal protection and promotion of human rights throughout the world. The Carter administration understood human rights most consistently with U.N. standards, but it could not avoid inconsistency, and the Reagan administration openly pursued a "double standard" of criticizing human rights abuse in communist countries while ignoring those in authoritarian allies. The temptation is too great to use human rights as just another weapon in the armory of anti-communism.

Individuals suffering human rights abuses can be helped in the short term, but building *respect* for human rights, or an international *order* where human rights will be as respected as legal rights are within national states, is best pursued in the long term. The only alternative is the United Nations. Not the United Nations of today, but a United Nations whose own bias and selectivity (currently in favor of the Third World) has been eliminated.

Reforming the United Nations so that it can advance the cause of human rights with true impartiality as in the fine conception of the Charter is, we think, the proper human rights policy objective of the American people and their government. An effective U.N. could defend the human rights of individuals even in strategic allies of one or the other great powers, as in South Korea or Afghanistan, where realism now turns a blind eye. More-

over, the U.N. is the proper forum for the integration of the international law of human rights, which must be based on multilateral agreements, not on unilateral interventions. The exemptions for derogable rights, *ordre public*, and right of property are not really acceptable to Americans. That is why integration of the law of human rights must be one of the earliest steps in a process of strengthening.

The way to build more impartial supervisory structures within the U.N. is to increase use of individual experts serving in their personal capacity in the supervisory committees. State representatives should gradually be replaced by individual ones. Thus, the bodies operating under the Charter -- the General Assembly, Ecosoc, the Commission on Human Rights, and their subordinate bodies -- should not be enlarged, which is certain to lead to further "politicization." Where possible, they should be reduced in size and functioning, while the expert committees or courts under the various specialized instruments should be given more prominence (longer sessions, greater resources), as in the International Labour Organisation or the European Convention. This means that ratification of the instruments must become much more complete. In effect, states would relinquish their attempted control over human rights to an independent international organization representative of individuals.

Certain political developments are necessary for such a reform to be safe and effective. One is that a public constituency must develop for the new United Nations. In the U.S., the civil rights movement needs to see that its interests are linked with the fate of the international human

rights movement. Black Americans are beginning to see their links to black South Africans, but their identities with other races across the face of the globe have yet to lead to common action. The labor movement has yet to appreciate what the ILO is trying to do. American business people have yet to feel their kinship with the rising middle class abroad. Civil libertarians have yet to become acquainted with international lawyers.

One of the reasons why the human rights treaties have lain neglected in the Senate for so long is that the strong civil rights forces in the U.S. have not mobilized behind them. The two movements hardly know each other, as Jack Goldklang pointed out in an earlier debate.[142] Out of a new domestic consensus on human rights will come the support for a U.S. foreign policy that seeks to place human rights in the care of reformed U.N. institutions.

The end of the Cold War will certainly mean increased opportunity for international cooperation, including respect for human rights, as a new basis for peace. As the concept of toleration put an end to the religious wars of the 16th and 17th centuries, could respect for human rights do the same for the ideological wars of the 20th? If human rights are realistically to be entrusted to the United Nations, U.N. reform will become a political necessity. The United States historically, politically, and economically is well placed to undertake the world leadership for increasing U.N. competence in the field of human rights.

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[142] Lillich, 62-65.

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